

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 20, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Agile Sports Technologies, Inc.*

*v.*

*Hudl Brewing Company LLC*  
—

Opposition No. 91247770  
Opposition No. 91248316  
Opposition No. 91248342  
(Consolidated)  
—

Mary Ann Novak of Hilgers Graben PLLC for Agile Sports Technologies, Inc.

Mark Borghese of Borghese Legal, Ltd. for Hudl Brewing Company LLC.  
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Before Mermelstein, Greenbaum, and Larkin,  
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Hudl Brewing Company LLC (“Applicant”) has filed three applications to register the standard character mark HUDL BREWING COMPANY (BREWING COMPANY disclaimed) on the Principal Register for the following goods (as amended):

Beverage glassware; Bottle openers; Bottle stoppers specially adapted for use with wine bottles; Coasters, not of paper or textile; Corkscrews; Cups; Decanters; Dishware; Drinkware; Flasks; Glass stoppers for bottles;

Growlers; Ice buckets; Mugs; Nut crackers; Pet feeding and drinking bowls; Pitchers; Portable beverage container holder; Shot glasses; Sports bottles sold empty; Vacuum bottle stoppers, in International Class 21;

Aprons; Beachwear; Belts; Blouses; Hoodies; Jackets; Jerseys; Rainwear; Scarves; Shirts; Socks; Sweaters; Sweatshirts; Tank tops; Ties as clothing; Underwear; Polo shirts; Sport shirts; T-shirts, in International Class 25; and

Beer, ale, lager, stout and porter, in International Class 32.<sup>1</sup>

Agile Sports Technologies, Inc. (“Opposer” or “Hudl”) has filed Opposition Nos. 91247770, 91248316, and 91248342 against Applicant’s three applications, alleging in each case that Applicant’s HUDL BREWING COMPANY mark is likely to be confused with, and is likely to dilute by blurring, Opposer’s registered HUDL and HUDL-formative marks for various sports-related software and video goods and services.

The Board consolidated the three oppositions,<sup>2</sup> designating Opposition No. 91247770 as the “parent” case in which all post-consolidation filings were to be made,

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<sup>1</sup> Application Serial No. 87905622 in Class 32 (the “622 Application”), Application Serial No. 87905637 in Class 25 (the “637 Application”), and Application Serial No. 87905654 in Class 21 (the “654 Application”) were all filed on May 3, 2018 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use each mark in commerce in connection with the identified goods. Citations in this opinion to the application records are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

<sup>2</sup> Although the proceedings have been consolidated, each one retains its separate character and requires the entry of a separate judgment. *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1105 (TTAB 2016). Our decisions will be rendered in a single opinion, but we must “take into account any differences in the issues” among the cases. *Id.*

and which contains the record. The consolidated cases are fully briefed.<sup>3</sup> We dismiss all three oppositions.

## **I. The Record and Evidentiary Objections**

### **A. The Record**

The record consists of the pleadings in the three cases,<sup>4</sup> the files of the three opposed applications, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), and the following materials submitted by the parties:

#### **1. Opposer's Submissions:**

The Testimony Declaration of Joy Shadley, Opposer's Vice President of Global Marketing and Exhibits 1-43 thereto, 15 TTABVUE 3-410,<sup>5</sup>

Opposer's First Notice of Reliance covering Exhibits 44-45 thereto, consisting of excerpts from Applicant's responses to certain of Opposer's interrogatories and requests for admission, 17 TTABVUE 2-15;

Opposer's Second Notice of Reliance covering Exhibits 46-77 thereto, 18 TTABVUE 2-228, consisting of pages from Applicant's website at [hudlbrewing.com](http://hudlbrewing.com), *id.* at 6-14 (Exs. 46-47); Applicant's social media pages, *id.* at 15-19 (Exs.

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<sup>3</sup> Citations in this opinion to the briefs and other docket entries refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Unless otherwise indicated, all citations are to the TTABVUE docket in the parent case. Opposer's main brief appears at 30 TTABVUE and its reply brief appears at 32 TTABVUE. Applicant's brief appears at 31 TTABVUE.

<sup>4</sup> Applicant denied the salient allegations in the three notices of opposition, and did not assert any affirmative defenses.

<sup>5</sup> We will cite Ms. Shadley's Testimony Declaration ("Shadley Test. Decl."), Rebuttal Testimony Declaration ("Shadley Reb. Test. Decl."), and Declaration on the parties' cross-motions for summary judgment ("Shadley SJ Decl."), made of record by Applicant and discussed below, by paragraph and exhibit number (e.g., "Shadley Test. Decl. ¶ 10; Ex. 1") and, where useful in following our discussion, by TTABVUE page(s) as well.

48-49); Applicant's responses to an office action in the '637 Application, *id.* at 20-32 (Ex. 50); dictionary definitions and entries, *id.* at 33-43 (Exs. 51-54); third-party registrations and webpages, *id.* at 44-200, 207-28 (Exs. 55-73, 77); and press releases, *id.* at 201-06 (Exs. 74-76);

Opposer's Rebuttal Notice of Reliance covering Exhibits 81-82 thereto, consisting of pages regarding two cancelled third-party registrations from the USPTO's electronic databases, 28 TTABVUE 2-12; and

The Rebuttal Testimony Declaration of Ms. Shadley and Exhibits 78-80 thereto. 29 TTABVUE 2-29.

## **2. Applicant's Submissions:**

The Testimony Declarations of Dale Norfolk, Jr., Applicant's Manager and Member, 24 TTABVUE 2-5, and Kenneth Cooper, Applicant's Manager and Member, 25 TTABVUE 2-5;<sup>6</sup>

Applicant's First Notice of Reliance covering Exhibit A, consisting of a page from Opposer's website with an embedded video, 19 TTABVUE 2-8;<sup>7</sup>

Applicant's Second Notice of Reliance covering Exhibits B-DD, consisting of electronic records from the USPTO database of third-party registrations of HUDDLE-, HUDDL-, and HUDL- formative marks, 20 TTABVUE 2-193;

Applicant's Third Notice of Reliance covering Exhibits EE-SS, consisting of a dictionary definition of "huddle" and webpages displaying HUDL- and HUDDLE-formative marks, 21 TTABVUE 2-49;

Applicant's Fourth Notice of Reliance covering Exhibits TT-GGG, consisting of webpages displaying hudl- and huddle-formative marks, 22 TTABVUE 2-47;

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<sup>6</sup> We will cite the Norfolk and Cooper Declarations in the manner of the Shadley Declarations.

<sup>7</sup> Applicant subsequently submitted a USB drive. 27 TTABVUE 2-8.

Applicant's Fifth Notice of Reliance covering Exhibits HHH-PPP, consisting of webpages displaying HUDL- and HUDDLE-formative marks, 23 TTABVUE 2-39; and

Applicant's Sixth Notice of Reliance covering Exhibit QQQ, consisting of Ms. Shadley's Summary Judgment Declaration. 26 TTABVUE 2-22.

## **B. Evidentiary Issues**

### **1. Opposer**

With respect to Applicant's Notices of Reliance, Opposer "objects to Exhibits B – DD as hearsay and, pursuant to Federal Rule of Evidence 402, to the extent Applicant seeks to use the exhibits or any statements contained within them for other than the limited purposes permitted." 30 TTABVUE 45-46. Opposer "objects to Exhibits FF – VV and XX – PPP as hearsay," *id.* at 46,<sup>8</sup> and on the ground of relevance because "the evidence is insufficient to show the actual use of a relevant mark—much less the scope and nature of that use" and certain documents "appear wholly unrelated to any of the goods and services at issue." *Id.* Opposer "objects to Exhibits MMM – PPP, which appear to be social media account rankings presented as search results, as irrelevant under Rule 402." *Id.*

Opposer also objects to portions of Applicant's testimony declarations on the ground of relevance, arguing that Applicant's witnesses are attempting to limit its

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<sup>8</sup> Opposer separately objects to Exhibit FF because it "is not the type of definition or evidence of which the Board may take judicial notice." 30 TTABVUE 46 (citing *In re Jimmy Moore LLC*, 119 USPQ2d 1764 (TTAB 2016) (rejecting the applicant's request to take judicial notice of its patent)). We overrule this objection because Applicant did not request the Board to take judicial notice of the pertinent pages from the Gallaudet University website, but rather submitted them under Applicant's Third Notice of Reliance.

goods and channels of trade, and to alter its standard character mark claim, by extrinsic evidence. *Id.* at 46-47.

Opposer's hearsay objections are moot because we consider Internet materials only for what they show on their face, not for the truth of the matters stated in them, "whether there is an objection or not." *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1040 n.18 (TTAB 2018) (citing *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031 (TTAB 2010)). We need not address Opposer's relevance objections because we are "capable of weighing the relevance and strength or weakness of the objected to testimony, including any inherent limitations [and] [a]s necessary and appropriate, we will point out any limitations in the evidence or otherwise note that the evidence cannot be relied upon in the manner sought." *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at \*4 (TTAB 2020), *appeal docketed* (Sept. 16, 2020) (quoting *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017)). "In short, 'we simply accord the evidence whatever probative value it deserves, if any at all.'" *Id.* (quoting *Hunt Control Sys. Inc. v. Koninklijke Philips Elec. N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011), *rev'd in part on other grounds*, No. 11-3684 (SRC) (CLW), 2017 WL 3719468 (D.N.J. Aug. 29, 2017)).

## **2. Applicant**

Applicant objects to paragraphs 11-12, 17-18, 24-25, 27, 29, 36-39, 63, and 73 in Ms. Shadley's Testimony Declaration "for lack of foundation, competency, and lack of personal knowledge." 31 TTABVUE 54. Applicant argues that

[h]er technical knowledge, if any, is limited to marketing technology and analytics. There is no foundation that Ms. Shadley has any personal technical knowledge concerning the number of unique users of [Opposer's HUDL] software, the number of coaches who use the software, the number of athletes who use the software, the number of app downloads, the number of persons who have watched any of the videos Opposer hosts, or the number of views of those videos.

*Id.* Applicant claims that Ms. Shadley's lack of personal knowledge is demonstrated by inconsistencies between her trial testimony and her testimony on the parties' cross-motions for summary judgment. *Id.* at 54-55. Applicant concludes that her testimony "on facts for which there is lack of foundation, competency, or lack of personal knowledge should be disregarded and given no weight by the Board." *Id.* at 55. Applicant similarly objects to paragraphs 4, 6, and 7 in Ms. Shadley's Rebuttal Testimony Declaration, and separately objects to paragraph 9 on the ground that her "search of Merriam-Webster online is improper rebuttal evidence offered in support of Opposer's case in chief rather than in response to Applicant's evidence." *Id.* The objection to the testimony in paragraph 9 is moot because Ms. Hadley's rebuttal testimony refers to evidence previously made of record in Opposer's case-in-chief under its Second Notice of Reliance. 18 TTABVUE 36-38.

Applicant also "objects to Opposer's Internet evidence as hearsay," *id.*, specifically Exhibits 1-35, 46-49, 51-54, 57-60, 74-77, and 78-80, *id.*, arguing that "Opposer's internet evidence may be offered only for what it shows on its face rather than for the

truth of the matters asserted therein,” *id.* at 56, and to “Opposer’s dictionary evidence attached as Exhibits 51-54 as hearsay.” *Id.*<sup>9</sup>

In a portion of its brief directed to one of the factors on Opposer’s likelihood of confusion claim, Applicant argues that “common law use of the marks on [clothing and beverageware] was not cited by Opposer as a basis for the Opposition,” and that “Opposer’s claim in all three oppositions is that there is a likelihood of confusion with ‘Opposer’s registered HUDL marks.’” 31 TTABVUE 33 n.1 (quoting Notices of Opposition ¶ 18).

Opposer responds in its reply brief that Applicant “tries to gloss over this evidence by asserting the opposition is based solely on Applicant’s registered marks and not its common law rights.” 32 TTABVUE 10. Opposer argues that its three Notices of Opposition “all explicitly claim that ‘registration of the Opposed Mark would violate 15 U.S.C. §§ 1052 (d) and 1125(a)’ . . . and thus Hudl’s common law rights are explicitly asserted,” *id.* at 10-11 (emphasis in original), and that “[r]egardless of whether or not Hudl has pleaded the common law rights it has in its HUDL mark for t-shirts, apparel, and beverage wear [sic], the undisputed evidence establishes that it uses its HUDL mark on these items, as well as for the software and services listed in its registrations.” *Id.* at 11.

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<sup>9</sup> The cited evidence consists of the results of searches of the MERRIAM-WEBSTER DICTIONARY and DICTIONARY.COM for the word “hudl,” which showed no entries for that word in the dictionaries, 18 TTABVUE 33-36, and definitions of the term “sports bar” from those dictionaries. *Id.* at 37-43. According to Applicant, “Opposer offers this evidence for the purported truth of its contents.” 31 TTABVUE 56.

Most of Applicant's hearsay objections to Opposer's Internet evidence are moot for the reasons stated above in connection with Opposer's similar objections, but we address and overrule Applicant's hearsay objection to the dictionary entries because it "is contrary to both Board and Federal Circuit precedent. We may and routinely do rely on dictionary definitions, including from online dictionaries." *Ricardo Media Inc. v. Inventive Software, LLC*, 2019 USPQ2d 311355, at \*2 (TTAB 2019) (citing *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007)).

With respect to Applicant's objections to Ms. Shadley's testimony, a "witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. A witness's testimony regarding matters may be excluded if the proponent of the testimony does not show that the witness has personal knowledge of the matters. *See City Nat'l Bank v. OPGI Mgmt. PG Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1673-74 (TTAB 2013) (excluding testimony of the respondent's in-house counsel about the respondent's historical use of the involved mark prior to his employment with the respondent because the respondent did not show that he had personal knowledge of those matters).

"Evidence to prove personal knowledge may consist of the witness's own testimony." Fed. R. Evid. 602. In her Testimony Declaration, Ms. Shadley testified that she has been employed by Opposer since December 2017, first as Opposer's Director of Marketing Operations between December 2017 and August 2018 and, since August 2018, as Opposer's Vice President of Global Marketing. Shadley Decl.

¶ 2. She further testified that in her current position, she “lead[s] the teams responsible for the HUDL brand experience, both in the United States and abroad, and the marketing of the HUDL brand,” “oversee[s] the teams that are responsible for positioning the HUDL brand, brand storytelling, marketing, public relations, visual communications and design, content marketing, and social media and web development,” and “lead[s] the teams responsible for marketing technology and analytics.” Shadley Decl. ¶ 3.

Applicant did not cross-examine Ms. Shadley regarding her Testimony Declaration, or introduce any testimony or other evidence supporting Applicant’s argument that Ms. Shadley lacks what Applicant calls “personal technical knowledge” to testify competently regarding the various metrics of Opposer’s business in the cited paragraphs in her Declarations.<sup>10</sup> We find that Ms. Shadley sufficiently established her personal knowledge of the matters discussed in the cited paragraphs through her testimony in her Testimony Declaration regarding her job duties and responsibilities, and we overrule Applicant’s objections to her testimony in the cited paragraphs.

We turn now to Applicant’s argument that common law use of the HUDL mark on clothing and beverage ware was not pleaded by Opposer and that Opposer’s Section 2(d) claim should be limited to Opposer’s registered marks. Opposer’s argument that its “common law rights are explicitly asserted” in its Notices of Opposition, 32

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<sup>10</sup> Applicant relies principally on an alleged inconsistency between her testimony at trial and her testimony on the parties’ cross-motions for summary judgment. We find that Opposer satisfactorily explained the claimed inconsistency in its reply brief. 32 TTABVUE 15 n.2.

TTABVUE 11, is revisionist history written by the successor counsel to Opposer's original counsel, who filed the Notices. 5 TTABVUE 2. The Notices make no mention of any common law marks, and instead focus solely on Opposer's multiple registered marks. The preamble to each Notice states that Opposer opposes registration of Applicant's mark "because Opposer has established extensive rights in its registered HUDL marks." 1 TTABVUE 7 (Opposition Nos. 91247770, 91248316, and 91248342). The allegation in the preamble cited by Opposer that "registration of the Opposed Mark would violate 15 U.S.C. §§ 1052 (d) and 1125(a)," *id.*, misstates the law to the extent that it refers to Section 43(a) of the Trademark Act. Registration of Applicant's marks may violate Section 2(d), which bars the registration of a mark that is likely to be confused with a registered mark, but Section 43(a), which provides a claim in a civil suit for infringement or false advertising, has nothing to do with registration, and is thus "outside the Board's jurisdiction." *Fiat Grp. Autos. S.p.A. v. ISM, Inc.*, 94 USPQ2d 1111, 1116 n.8 (TTAB 2010). In any event, Opposer's reference to Section 43(a) cannot be read to assert common law rights, explicitly or otherwise, particularly against the backdrop of Opposer's allegations in the Notices that it "owns multiple trademark registrations for HUDL in various forms and classes," 1 TTABVUE 8 (Not. of Opp. ¶ 2) (Opposition Nos. 91247770, 91248316, and 91248342), that "the Opposed mark is identical in sound, appearance, meaning, connotation and commercial impression to the Opposer's HUDL registrations," *id.* at 12 (Not. of Opp. ¶ 12), and that "Applicant's Opposed Mark so resembles Opposer's registered HUDL marks that such use shall [sic] confusion, mistake, or deception as to the origin, sponsorship, or

approval of Applicant with Opposer and is likely to continue to do so in the future, in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).” *Id.* at 13 (Not. of Opp. ¶ 18). Opposer’s Notices of Opposition did not put Applicant on notice that Opposer intended to rely at trial on any common law rights in the HUDL mark for clothing and beverage ware in addition to its registered marks. *Cf. Safer*, 94 USPQ2d at 1035 (holding that the opposer’s notice of opposition, which did not plead the registered DEER-OFF mark that the opposer first asserted in a rebuttal notice of reliance, together with other actions prior to trial, did not put the applicant on notice of the opposer’s intention to rely on that mark).

Opposer’s fallback claim is that “[r]egardless of whether or not Hudl has pleaded the common law rights it has in its HUDL mark for t-shirts, apparel, and beverage wear [sic], the undisputed evidence establishes that it uses its HUDL mark on these items, as well as for the software and services listed in its registrations.” 31 TTABVUE 11. In essence, Opposer’s position is that while it did not plead common law use, it proved such use and should be allowed to rely on it. This argument is foreclosed by the rule that “[a] plaintiff may not rely on an unpleaded claim in its brief, and to pursue an unpleaded claim, a plaintiff’s pleading must be amended under Fed. R. Civ. P. 15(b) to assert the claim, or the claim must have been tried by express or implied consent.” *Brooklyn Brewery*, 2020 USPQ2d 10914, at \*3. Opposer never amended its Notices of Opposition to assert common law use of HUDL, Applicant’s argument that Opposer did not plead common law use “as a basis for the Opposition,” 31 TTABVUE 33 n.3, establishes that “there has been no express

consent,” *Brooklyn Brewery*, 2020 USPQ2d 10914, at \*3, and Opposer never argued in either of its briefs that the issue of its common law use of HUDL was tried by implied consent. Accordingly, we have given Opposer’s evidence of common law use of its HUDL marks no consideration in our decisions.

## **II. Background and General Factual Findings<sup>11</sup>**

### **A. Opposer and Its HUDL Business and Marks**

Opposer was founded in 2006. Shadley Test. Decl. ¶ 4. Opposer originally did business under the name and mark HUDDLE, but in mid-2008 switched to HUDL. Shadley SJ Decl. ¶ 5. An article made of record by Opposer states that in 2006 Opposer was “then known as Huddle.” Shadley Test. Decl. ¶ 46; Ex. 17 (15 TTABVue 172). Opposer has operated under the HUDL name and mark since then. Shadley Test. Decl. ¶ 5.

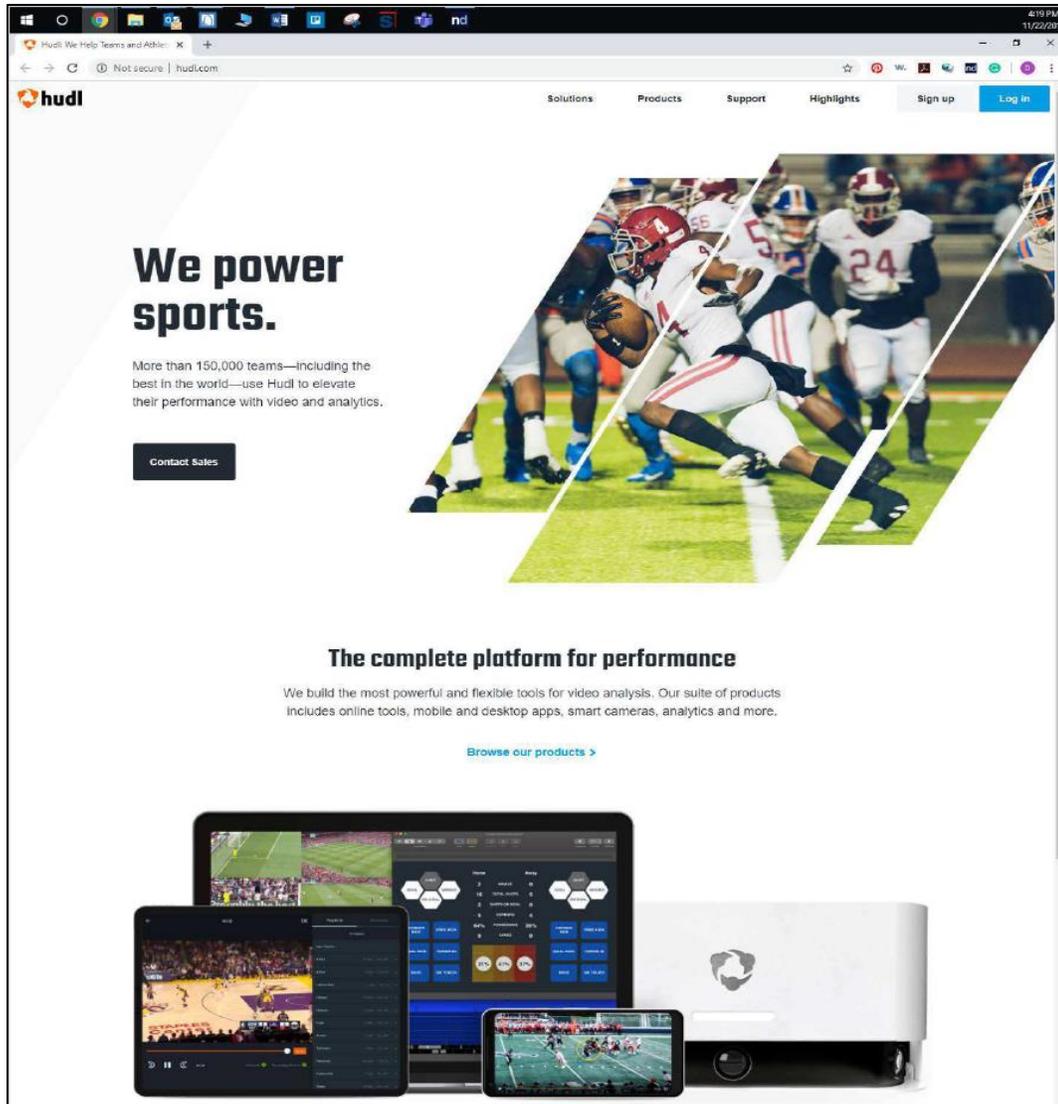
Opposer is a “sports analysis software company” that provides computer software, related hardware (such as cameras, tripods, batteries, and remotes), and services to athletic teams at the professional, college, high school, and club and youth team levels. Shadley Test. Decl. ¶ 4. These goods and services are intended to help teams and athletes at every level to study and improve their performance. Shadley Test. Decl. ¶ 4. Opposer offers athletic teams the tools to edit and share video, interact with statistics, and create quality highlight reels for entertainment and recruiting purposes. Shadley Test. Decl. ¶ 4.

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<sup>11</sup> This section includes general findings regarding the parties and their respective marks, businesses, goods, and services. We make additional findings below in connection with specific issues.

Opposer's software products are built around digital video playback and provide sports teams with an online mobile platform for video sharing, editing, and review. Teams upload games (captured on a mobile device running the HUDL app or a digital camera) to Opposer's servers, where they are available to anyone with viewing permission (from coaches and training staff, to players, to scouts and recruiters). Shadley Test. Decl. ¶ 6. Coaches and training staff can flag sections of video and insert notes or audio commentary for players to review. They can also use clips to create digital playbooks for their team. Athletes can use the software to study plays and improve their technique, to edit and share highlight reels on their own customizable HUDL profile page, or to send their coaches clips to analyze. Shadley Test. Decl. ¶ 6. Opposer also offers athletic teams various add-on goods and services, Shadley Test. Decl. ¶ 7, more advanced software for video capture, analysis and coding for elite teams, Shadley Test. Decl. ¶ 8, a smart camera that records and uploads game action to Opposer's online platform, and various accessories. Shadley Test. Decl. ¶ 9. Opposer's goods and services are used by teams involved in numerous sports. Shadley Test. Decl. ¶ 18; Ex. 2.

We reproduce below several pages from Opposer's website at hudl.com that discuss and display the use of Opposer's goods and services:

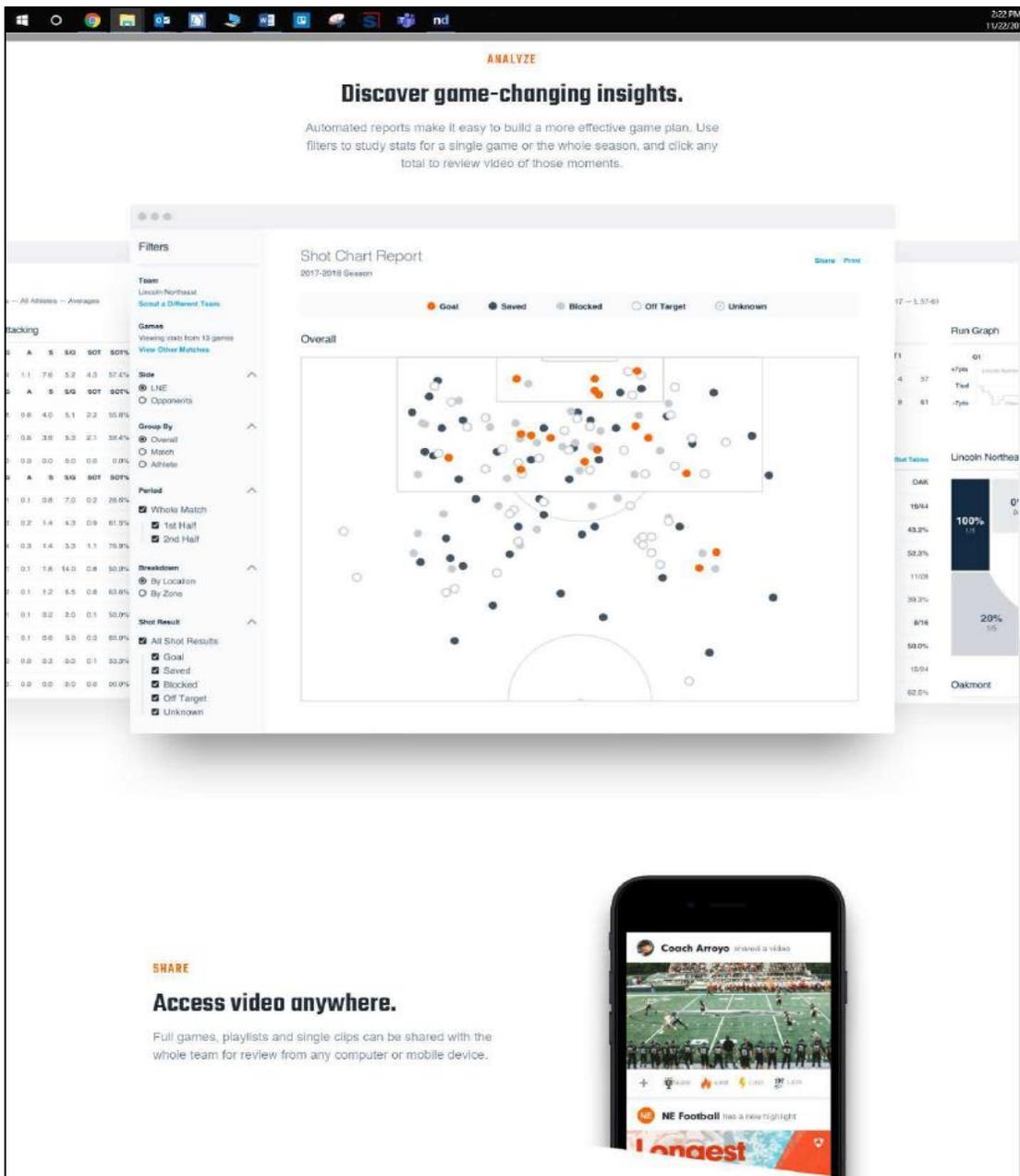


Shadley Test. Decl. ¶ 10; Ex. 1 (15 TTABVUE 22).

The screenshot displays the hudl.com website interface. At the top, there is a navigation bar with links for Solutions, Products, Support, Highlights, Sign up, and Log in. The main content area features a large headline: "One platform to help the whole team improve". Below this headline are two buttons: "Download on the App Store" and "GET IT ON Google Play". The central part of the page shows a collage of basketball analytics, including court diagrams with various statistics (e.g., 100%, 80%, 35%, 20%, 18%, 16%) and a video player showing a basketball game in progress. Below the main content, there are three distinct sections:

- RECORD AND UPLOAD**: A section titled "Stick with your favorite device." with a sub-headline "There's no need for expensive equipment. Record games, practice and training sessions with your iPhone, iPad or hard drive camera. You can even connect to Wi-Fi to upload video as it records and study within minutes." To the right of this text is a red play button icon with a pause symbol and a timer showing "01:54:10". Below the play button is a small cloud icon and the text "Uploading...".
- REVIEW**: A section titled "Find key moments fast." with a sub-headline "Use playlists to quickly jump to the exact moments you want to study. Create a presentation for team review, or pull together clips to illustrate what a player needs to improve." To the left of this text is a tablet displaying a video player interface with a list of clips on the right side, including "Defence by #12 C. Staples", "Defence by #4 C. Jones", and "Save by #1 M. Carter".

Shadley Test. Decl. ¶ 10; Ex. 1 (15 TTABVUE 27).



Shadley Test. Decl. ¶ 10; Ex. 1 (15 TTABVUE 29).

In 2010, Opposer served about 2,000 teams, but by 2015 Opposer served more than 100,000 teams, and by 2020 Opposer served more than 160,000 teams worldwide, the vast majority of which are in the United States. Shadley Test. Decl.

¶ 11. By the end of 2017, there were more than 58 million unique coaches, trainers,

athletes, and recruiters using HUDL software, and by 2020 there were at least six million unique registered users of HUDL software consisting of coaches, trainers, athletes, and recruiters. Shadley Test. Decl. ¶ 12. By 2017, Opposer's software products and services had been adopted by several National Football League teams, six teams in the National Hockey League, and all but one of the 30 teams in the National Basketball Association. Shadley Test. Decl. ¶ 14. As of 2020, 99% of all high schools in the United States used HUDL software, representing more than 102,000 school teams, 405,000 coaches, and 1.8 million athletes in the United States. Shadley Test. Decl. ¶ 17.

Teams and players can use the HUDL software to interact with fans and college recruiters, Shadley Test. Decl. ¶¶ 20-22, to create highlight films to share with family, friends, fans and recruiters via a HUDL team profile page, and to update fans on schedules, rosters, and results, and athletes can create highlight reels to share with recruiters and others on their own customizable HUDL profile page. Shadley Test. Decl. ¶¶ 21-22. Such videos, recruiting reels, team profile pages, and player profile pages, as well as videos created by Opposer's employees, are available over the Internet via Opposer's website at hudl.com, and via team and player profile pages on the website, where they can be viewed by fans, classmates, friends, families, recruiters, coaches, and athletes across the country (whether or not the viewer is a user of HUDL software). Shadley Test. Decl. ¶ 23. Athletes and coaches who want to highlight an athlete's or team's accomplishments can send fans a direct link to the pertinent profile page or post a link to that page on social media. Shadley Test. Decl.

¶ 26. These highlight reels and videos can also be downloaded by coaches and players and posted on other social media platforms. Shadley Test. Decl. ¶ 26.

Ms. Shadley testified that Opposer “provides a hub for video highlights and recruiting reels that connects millions of athletes and fans,” which she claimed to be “the largest community in high school sports.” Shadley Test. Decl. ¶ 24. This “community” involves 99% of United States high schools, six million registered users, approximately 150,000 teams, about five million app downloads, and approximately 80 million unique fans, the vast majority of which are in the United States. Shadley Test. Decl. ¶ 24. According to Ms. Shadley, Opposer promotes itself “to brand-owners that may wish to partner with [Opposer] to reach this community,” and Opposer’s website displays some of the brands that have partnered with Opposer. Shadley Test. Decl. ¶ 24; Ex. 3 (15 TTABVUE 81).

Ms. Shadley testified that the HUDL mark is “known to the some 80 million sports fans who view the highlight reels and video content created using HUDL software through www.hudl.com’s hub,” and she claimed that “[e]ven this, however, vastly underestimates the audience for the HUDL highlight reels and video content because HUDL highlight reels and videos (which, as noted above, include the HUDL mark in the upper right-hand corner) are routinely posted directly to other social media sites and platforms by coaches, athletes, and fans, including Facebook, Instagram, and YouTube.” Shadley Test. Decl. ¶ 27. To date there have been more than one billion views of video highlights posted on Opposer’s website and that number continues to grow rapidly. Shadley Test. Decl. ¶¶ 29-31; Exs. 4-5 (15 TTABVUE 78-90). There

have also been millions of views of other pages on Opposer's website, such as "Hudl Top 5," "Football Highlights," and "Basketball Highlights." Shadley Test. Decl. ¶¶ 35-36; Exs. 7-9 (15 TTABVUE 92-113). There has been an increase in the viewing of Opposer's highlight videos during the Covid-19 pandemic because of the decrease in attendance at live sporting events. Shadley Test. Decl. ¶ 51; Ex. 22.

Opposer has been featured in various media, Shadley Test. Decl. ¶¶ 40-43, 45, 47-51; Exs. 11-14, 16, 18-22 (15 TTABVUE 129-63, 177-272), and has been listed as among the leading sports technology providers and most innovative companies. Shadley Test. Decl. ¶¶ 44, 46; Exs. 15, 17 (15 TTABVUE 189-91, 195-201).

Opposer markets its goods and services through its website at hudl.com, through multiple social media, through *Hudl The Magazine*, which is distributed to Opposer's customers, through unspecified traditional print and online advertising, and by hosting or participating in events. Shadley Test. Decl. ¶¶ 54-62; Exs. 24-29 (15 TTABVUE 281-306).

Opposer has also entered into strategic partnerships with various organizations and companies, and has publicly announced those partnerships. Shadley Test. Decl. ¶ 65; Exs. 34-35 (15 TTABVUE 339-42).

Opposer owns multiple registrations of the mark HUDL and other HUDL-formative marks. Shadley Test. Decl. ¶ 68; Exs. 36-43.<sup>12</sup> The HUDL mark is currently registered in standard characters for

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<sup>12</sup> Opposer attached USPTO electronic records regarding its registrations to its Notices of Opposition, 1 TTABVUE 15-50, which made them of record under Trademark Rule

Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions (Registration No. 3642808 (the “808 Registration”));

Education and entertainment services, namely, providing a website featuring audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances, and Software as a service services featuring software for video motion analysis, software for training and coaching in the field of sports, athletics, and physical education, and software for athletes, students, coaches, trainers, and instructors to create and view video, audio, and text, and communicate via video, audio and text (Registration No. 4831441) (the “441 Registration”)); and

Audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips; providing access to information, audio, and video via websites (Registration No. 5394399 (the “399 Registration”)).

## **B. Applicant and Its HUDL BREWING COMPANY Mark**

Applicant operates a brewery in Las Vegas, Nevada. Norfolk Decl. ¶ 3. As of the time of trial, it sold beer and T-shirts, and planned to sell other apparel items and glassware. Norfolk Decl. ¶ 3. Applicant “chose the mark HUDL BREWING COMPANY, using a spelling variation of the word ‘huddle’ as the word huddle brings to mind a gathering of people,” and “decided to use a different spelling for HUDL to create a more modern feel for the mark.” Norfolk Decl. ¶ 7; 17 TTABVUE 8

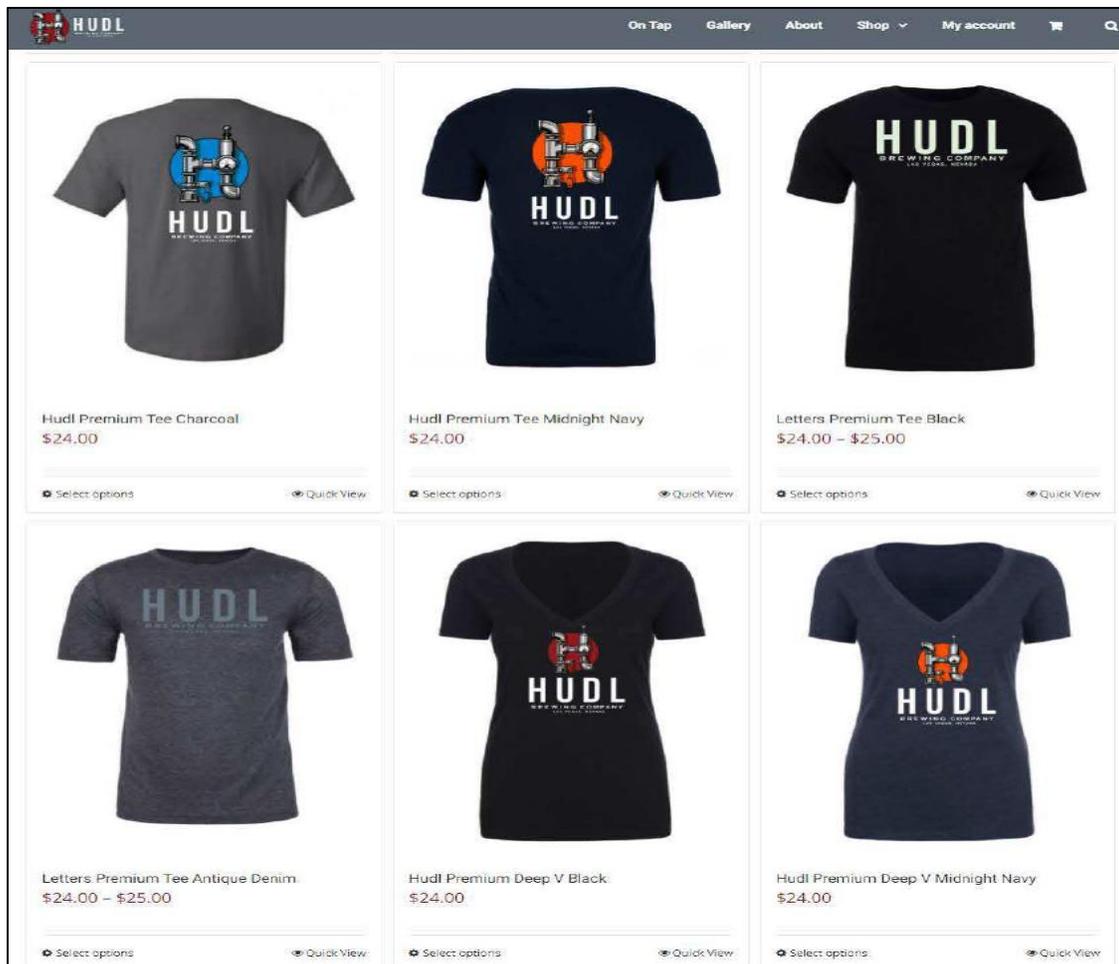
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2.122(d)(1), 37 C.F.R. § 2.122(d)(1). It was unnecessary for Opposer to make the registrations of record a second time through Ms. Shadley’s Testimony Declaration.

(Applicant's Response to Opposer's Interrogatory No. 2). There is no evidence of Applicant's use of the mark in connection with any of the goods identified in its intent-to-use applications prior to their May 3, 2018 filing date.

Applicant's website is accessible at hudlbrewing.com. Norfolk Decl. ¶ 4; 17 TTABVUE 14 (Applicant's Response to Opposer's Request for Admission No. 6). We reproduce below some pages from the website, including one displaying T-shirts offered by Applicant at the time of trial under the HUDL BREWING COMPANY mark:





*Id.* at 11.

### III. Entitlement to a Statutory Cause of Action<sup>13</sup>

A plaintiff's entitlement to a statutory cause of action for opposition or cancellation is a threshold issue in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed.

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<sup>13</sup> Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act under the rubric of “standing,” and Opposer here has done so as well. 30 TTABVUE 20 (section heading entitled “Opposer Has Standing”). Despite the change in nomenclature, the substance of the analysis of this issue in our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remains applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at \*2 (TTAB 2020).

Cir. 2020) *reh'g en banc denied*, 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *petition for cert. filed* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). Opposer may oppose Applicant's applications if each such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and Opposer has a reasonable belief in damage that is proximately caused by registration of the involved mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020), *cert. denied*, \_\_\_ U.S. \_\_\_ (2021).

Applicant does not dispute Opposer's entitlement to a statutory cause of action, which we find "is established with respect to its likelihood of confusion and dilution claims by its registrations" of its various pleaded HUDL marks, "which the record shows to be valid and subsisting, and owned by Opposer." *N.Y. Yankees P'ship v. IET Prods. & Servs., Inc.*, 114 USPQ2d 1497, 1501 (TTAB 2015) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000)).

#### **IV. Section 43(c) Claim**

We begin with Opposer's claim of dilution by blurring under Section 43(c), which potentially provides Opposer a means to prevail in all three oppositions "regardless of the presence or absence of actual or likely confusion [or] of competition. . . ." 15 U.S.C. § 1125(c)(1). "The Trademark Act provides for a cause of action for the dilution of famous and distinctive marks:

[T]he owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous,

commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of actual or likely confusion, of competition, or of actual economic injury.”

*TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1103 (TTAB 2018) (citing 15 U.S.C. § 1125(c)(1)). “Section 13(a), 15 U.S.C. § 1063(a), makes dilution by blurring or tarnishment under Section 43(c) a basis for opposing registration.” *Id.*

“A successful claim for federal trademark dilution by blurring under Section 43(c) of the Trademark Act requires that a plaintiff plead and prove the following in a Board proceeding:

1. Plaintiff owns a famous mark that is distinctive;
2. Defendant is using a mark in commerce that allegedly dilutes plaintiff’s famous mark;
3. Defendant’s use of its mark began after plaintiff’s mark became famous; and
4. Defendant’s use of its mark is likely to cause dilution by blurring.”

*Id.*

“A threshold question in a federal dilution claim is whether the mark at issue is ‘famous.’” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1724 (Fed. Cir. 2012). The requirement of proof of ownership of a “famous” mark is an exacting one following the amendment of the dilution provisions of the Trademark Act in 2006 through the Trademark Dilution Revision Act (“TDRA”). “Under the TDRA, a mark is famous if it ‘is widely recognized by the general consuming public mark of the United States as a designation of source of the goods

or services of the mark's owner.” *Coach Servs.*, 101 USPQ2d at 1724 (quoting 15 U.S.C. § 1125(c)(2)(A)). “By using the ‘general consuming public’ as the benchmark, the [TDRA] eliminated the possibility of ‘niche fame,’ which some courts had recognized under the previous version of the statute.” *Id.*

“It is well-established that dilution fame is difficult to prove.” *Id.* “An opposer must show that, when the general public encounters the mark ‘in almost any context, it associates the term, at least initially, with the mark’s owner,” *TiVo Brands*, 129 USPQ2d at 1103 (quoting *Coach Servs.*, 101 USPQ2d at 1725), and that the mark has “become a ‘household term [with] which almost everyone is familiar.” *Id.* at 1112 (quoting *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1181 (TTAB 2001)).<sup>14</sup>

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<sup>14</sup> Applicant argues that “[c]ourts have generally recognized that in order to satisfy the ‘famousness’ element of a trademark dilution claim, approximately 75% of the general consuming public of the United States should recognize the mark.” 31 TTABVUE 47 (citing *7-Eleven, Inc. v. Wechsler*, 83 USPQ2d 1715 (TTAB 2007)). Opposer correctly notes that this “is not a rule prescribed by” the *7-Eleven* case “because 73% awareness was enough *in that case*.” 32 TTABVUE 16-17 (emphasis in original). Opposer goes on to note that in *NASDAQ Stock Market Inc. v. Antartica, S.r.l.*, 69 USPQ2d 1718 (TTAB 2003), “the Board found evidence showing 80% of investors recognized NASDAQ, in combination with evidence from dictionaries and newspapers showing recognition extended beyond investors, was enough to establish fame for dilution purposes.” 32 TTABVUE 17. Opposer argues that it has “demonstrated fame under either standard with news articles, nearly 100% adoption of its software and services by sports teams and athletes, and some 80 million unique users (in other words roughly 25% of the United States general population) who have viewed its videos as measured by Hudl’s website traffic (and therefore not even counting those who are familiar with its marks by accessing Hudl content and videos through Facebook, YouTube, or other platforms).” *Id.* Contrary to Opposer’s argument, there is only one standard for proof of fame under Section 43(c) after the TDRA: A famous mark is one that is “widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. § 1125(c)(2)(A). There is no set numerical percentage of the general public that must be aware of a mark for it to be famous, nor is Opposer required to produce any specific type of evidence (such as a survey). But Opposer certainly faces an uphill battle to show that prior to Applicant’s May 3, 2018 filing date, HUDL had become a “household term [with] which almost everyone is familiar,” *TiVo Brands*, 129 USPQ2d at 1112, when Opposer states that “25% of the United States general population” has been

In determining whether Opposer's HUDL mark is famous, we "may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register."

*Id.* at 1104 (quoting 15 U.S.C. § 1125(c)(2)(A)). We address each factor below.

**A. Duration, Extent, and Geographic Reach of Advertising and Publicity of the HUDL Mark**

Opposer argues that it has "invested tens of millions in marketing the goods and services it offers under the HUDL mark and has engaged in extensive marketing across the United States," 30 TTABVUE 39 (citing Shadley Test. Decl. ¶¶ 53-69), and that it has "received extensive publicity due to the revolutionary nature of its HUDL software, products, and services." *Id.*<sup>15</sup> Applicant responds that "[t]here is no evidence that any significant portion of this marketing budget goes to general mass marketing rather than specifically directed at Opposer's customers, namely schools or sports teams," 31 TTABVUE 47, and that Opposer offers "[a] grand total of six (6) news

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exposed to the HUDL mark through Opposer's website, the main means by which the public has been exposed to the mark.

<sup>15</sup> We will consider the media coverage of Opposer under the third fame factor, the extent of actual recognition of the HUDL mark. *See TiVo Brands*, 129 USPQ2d at 1104-05; *Nike, Inc. v. Maher*, 100 USPQ2d 1018, 1024-26 (TTAB 2011).

articles referencing the company prior to May 3, 2018 primarily discussing Opposer as a tech startup.” *Id.* at 49.

We have no information regarding the extent of Opposer’s advertising and promotional expenditures prior to 2017. Opposer’s \$6.2 million marketing budget in 2017, the only full year prior to May 3, 2018 for which figures are provided, Shadley Test. Decl. ¶ 53, pales in comparison to the scale of the advertising expenditures in dilution cases in which marks have been found to be famous. *See, e.g., Chanel, Inc. v. Makarczyk*, 110 USPQ2d 2013, 2020-21 (TTAB 2014) (advertising expenditures of \$275 million between 2000-2007 and \$200 million between 2009-2012 found to be substantial and to support a finding that the opposer’s CHANEL mark was famous); *Nike*, 100 USPQ2d at 1026 (advertising expenditures of approximately \$6 billion over a 20-year period were “extensive and widespread” and supported a finding that the opposer’s JUST DO IT mark was famous); *Nat’l Pork Bd. v. Supreme Lobster & Seafood Co.*, 96 USPQ2d 1479, 1495 (TTAB 2010) (expenditures of more than \$25 million annually, and more than \$550 million dollars total, over a 20-year period of use of the opposer’s mark THE OTHER WHITE MEAT supported a finding that the mark was famous).

Equally importantly, we agree with Applicant that “[t]here is no evidence that any significant portion of this marketing budget goes to general mass marketing rather than specifically directed at Opposer’s customers, namely schools or sports teams.” 31 TTABVUE 47. Ms. Shadley testified that Opposer “engages in traditional print and online advertising,” Shadley Test. Decl. ¶ 61, but the only print publication that

she identified is Opposer's house organ HUDL, THE MAGAZINE, Shadley Test. Decl. ¶ 61, which Opposer "distributes to customers that features insights and stories from the performance analysis industry." Shadley Test. Decl. ¶ 61. There is no evidence that any of Opposer's marketing budget was ever spent at any time on the sort of print advertising that exposes a mark widely and to the general public. *Cf. Chanel*, 110 USPQ2d at 2020 (fame of CHANEL mark supported by the opposer's evidence that the "largest percentage of opposer's advertising budget is devoted to print advertisements that regularly appear in magazines and newspapers circulated on both a regional and national level," including "in sixty-six (66) different magazines with a national circulation, fourteen (14) different regional publications, and ten different trade publications," and in both "magazines devoted to fashion such as *Vogue*, *Glamour*, *Harper's Bazaar* and *Elle*," "men's magazines such as *GQ*, *Men's Journal* and *Golf Digest*," and "general interest magazines such as *People*, *Vanity Fair* and *The New Yorker* and newspapers with a large, general circulation such as *The New York Times*."). There is also no evidence of any advertising on television, the most ubiquitous advertising medium. *Cf. Nike*, 100 USPQ2d at 1026 (discussing the opposer's iconic network and cable television commercials under its JUST DO IT mark featuring well-known sports figures, many of which were "put out on the Internet" and watched millions of times).

Ms. Shadley also testified that Opposer advertises through social media, including through multiple Twitter, Facebook, and Instagram accounts, and through YouTube. Shadley Test. Decl. ¶ 56. She testified that one of Opposer's Facebook accounts has

more than 500,000 followers, that one of Opposer's Instagram accounts has 384,000 followers, and that Opposer's YouTube channels has had nearly 8.5 million views. Shadley Test. Decl. ¶¶ 58-60. There have been more than 1 billion views of video highlights on Opposer's website, Shadley Test. Decl. ¶ 29, including "views by some 80 million unique fans." 30 TTABVUE 40. These figures are not insubstantial, but again compare unfavorably to similar metrics in cases in which the Board has found marks to be famous. *Chanel*, 110 USPQ2d at 2020 (finding of fame of CHANEL mark supported by evidence that the opposer's Facebook page had attracted 9.5 million fans, that the opposer's YouTube page "has gained over 100,000 subscribers and almost 40 million views, and that the opposer's Twitter account "has more than 2 million followers."). In addition, Ms. Shadley testified that these social media are directed to "coaches, athletes, recruiters, and sports fans," Shadley Test. Decl. ¶ 56, and there is no evidence of the extent, if any, to which Opposer's presence on these social media exposes the HUDL mark to members of the general public who do not fall within one of those categories.

The scope and nature of Opposer's advertising and promotion under its HUDL mark do not support a finding of ubiquitous and sustained exposure of the mark to the general public in the United States. *Cf. Coach Servs.*, 101 USPQ2d at 1724 (the TDRA eliminated the possibility of "niche" fame). This factor thus does not support a finding that the mark is famous.

**B. The Amount, Volume, and Geographic Extent of Sales of Goods or Services Offered Under the HUDL Mark**

Opposer argues that it has used the HUDL mark since 2008, that its goods and services are used “by more than 160,000 active teams,” and that “[m]ore than 6 million coaches, athletes, and trainers use Hudl’s software, products, and services, including several NFL and NHL teams, and virtually every NBA team, as well as 99% of high schools in the United States.” 30 TTAVBUE 39-40 (citing Shadley Test. Decl. ¶¶ 12-18). Opposer also argues that its “highlight reels and videos (which carry the HUDL mark in the upper right-hand corner and have since at least early 2014) have acquired more than 1 billion views, including views by some 80 million unique fans.” *Id.* at 40 (citing Shadley Test. Decl. ¶¶ 20-29, 35-38; Exs. 3, 7-10).<sup>16</sup> Opposer concludes that there are “tens of millions of sports fans that recognize and know the HUDL mark from their direct engagement with HUDL videos, products, and services.” *Id.* Opposer provides no sales or revenues figures for any of its goods and services.

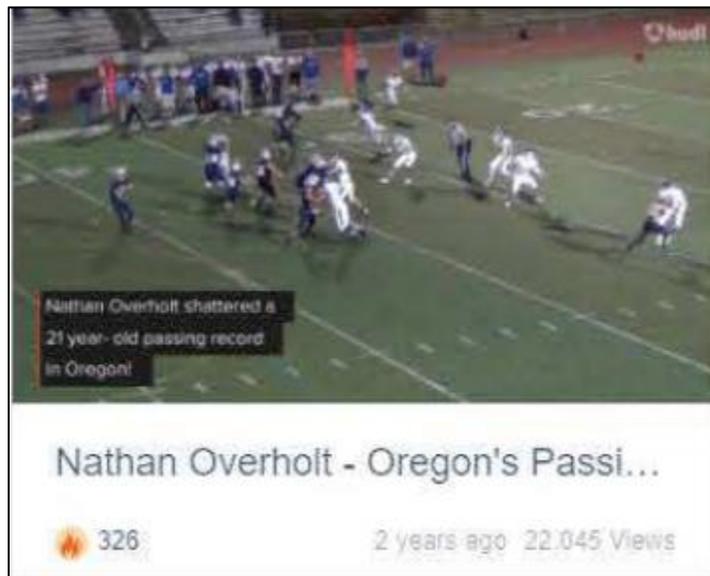
“[T]ens of millions of sports fans that recognize and know the HUDL mark from their direct engagement with HUDL videos, products, and services,” or even “80 million unique fans,” *id.*, are a relatively small slice of the population of the United States, which currently exceeds 330 million people according to the first reported

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<sup>16</sup> It is not clear how Opposer defines “unique” fans, but Ms. Shadley testified that 95% of these “80 million unique fans” are in the United States, Shadley Test. Decl. ¶ 24, so the relevant number of such viewers for our purposes does not exceed 76 million.

population count of the 2020 United States Census.<sup>17</sup> Opposer's core constituency of six million coaches, athletes, and trainers who use its software, products, and services, 30 TTAVBUE 39-40, who can be expected to be quite familiar with the HUDL mark, is a miniscule portion of the general public.

In addition, it is doubtful that non-registered users who view Opposer's highlight reels and videos would pay much, if any, attention to the HUDL mark, much less internalize it as a "household term [with] which almost everyone is familiar," *TiVo Brands*, 129 USPQ2d at 1112, when it appears in lowercase letters in the upper right-hand corner of many of these videos,<sup>18</sup> as shown below:



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<sup>17</sup> [www.census.gov/library/stories/2021/04/2020-census-data-release.html](http://www.census.gov/library/stories/2021/04/2020-census-data-release.html) (last accessed on August 18, 2021). The Board may take judicial notice of U.S. Census Bureau data and records. *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1271 n.7 (TTAB 2016).

<sup>18</sup> The HUDL word mark is even harder to see, or not visible at all, in the screenshots of numerous other videos made of record by Opposer, many of which display the logos of teams. Shadley Test. Decl. ¶¶ 36-37; Exs. 8-10 (15 TTABVUE 99-102, 104-29).

Shadley Test. Decl. ¶ 36; Ex. 8 (15 TTABVUE 102). Common sense alone suggests that people interested in viewing the highlight reel of a particular team or athlete, including coaches, recruiters, opponents, fans, and relatives, are far more likely to focus on the contents of the video, and the information about the athlete provided through it, than on the HUDL mark. Even if they noticed the HUDL mark, however, viewing videos once or even multiple times during a season does not involve the sort of exposure of the HUDL mark required for it to achieve “household name” status among the general public.

The amount, volume, and geographic extent of the sales of goods and services under the HUDL mark do not support a finding of ubiquitous and sustained exposure of the mark to the general public in the United States. We find that this factor does not support a finding that the HUDL mark is famous.

### **C. The Extent of Actual Recognition of the HUDL Mark**

“Perhaps the most significant of the four elements set forth in the Act to determine fame is the extent of actual public recognition of the mark as a source-indicator for the goods or services in connection with which it is used.” *TiVo Brands*, 129 USPQ2d at 1104 (quoting *Nike*, 100 USPQ2d at 1024). Opposer does not rely on any direct evidence of actual recognition, such as a consumer survey, but offers what it describes as “extensive publicity due to the revolutionary nature of its HUDL software, products, and services,” 30 TTABVUE 39, in the form of articles in various publications.

The pre-May 3, 2018 articles about Opposer and its goods and services focus primarily on the usefulness of Opposer's goods and services to high school and college coaches and athletes, and Opposer's innovation and growth as a start-up tech company, sometimes in the context of a discussion of other tech companies. Many of these articles are in local or specialized publications, and there is no evidence regarding the geographic or circulation exposure to the general public of any of the publications. We summarize the articles below.

A March 26, 2018 TECHWEEK article states that "Hudl is changing the way coaches and players are participating and competing," "is one of many digital startups, taking tasks achieved painstakingly by hand, online" by "manag[ing] to make sports analytics, a tool confined for the professionals, available for everyone," and "has been the recipient of mega success by striking the iron while it was heating up." Shadley Test. Decl. Ex. 14 (15 TTABVUE 157-58, 161);

A May 2018 cover story in CIOREVIEW discusses Opposer's CEO David Graff and Opposer's business, and names Opposer to its list of the "20 Most Promising Sports Technology Solutions Providers." Shadley Test. Decl. Ex. 15 (15 TTABVUE 162-64);

A February 26, 2016 article about an episode on CBS THIS MORNING discusses "an explosion of startup software companies in the heartland," particularly in the "Silicon Prairie" in Lincoln, Nebraska, among them Opposer's business of "servic[ing] sports teams, both amateur and professional." Shadley Test. Decl. Ex. 16 (15 TTABVUE 165-66);

A March 2016 FAST COMPANY magazine article entitled "How Hudl's Mobile-Video Software is Transforming Sports" with the subtitle "You may not have heard of Hudl, but hundreds of thousands of coaches and athletes around the world have-and are using it to up their game." Shadley Test. Decl. Ex. 17 (15 TTABVUE 170);

A May 27, 2015 article on OMAHA.COM discusses Opposer's acquisition of an Australian software development company. Shadley Test. Decl. Ex. 18 (15 TTABVUE 179);

An April 2, 2015 article on TECHCRUNCH.COM states that "You'd be forgiven for wondering how Hudl isn't just a niche business," that teams "from pros in the NFL and NBA down through college, high school and even little league sports teams" are now recording game tape to be annotated by coaches and shared with players, that Opposer realized \$30 million in revenue in 2014, and that "[t]here are plenty of startups crowding the paint, though, like XOS for the NFL, Sportstec for the NBA, and Krossover for high school teams." Shadley Test. Decl. Ex. 19 (15 TTABVUE 184, 187);

A September 23, 2014 NEW YORK TIMES article discusses the use of technology offered by different companies in Texas high school football, including a "Nebraska company, Hudl, [that] has built a multi-million-dollar business by putting footage from 14,000 high schools into servers it rents from Amazon," and discussing the use of Opposer's footage by coaches, players, parents, and fans. Shadley Test. Decl. Ex. 20 (15 TTABVUE 190-94);

Various articles in Shadley Test. Decl. Ex. 21, including a July 6, 2017 SILICON PRAIRIE NEWS article discussing Opposer's securing of \$30 million in funding and stating that "With the latest round of funding and the new headquarters set to open in late 2017, Hudl is now positioned to raise the profile of Lincoln and the Silicon Prairie in addition to increasing its global footprint" (15 TTABVUE 213); a September 1, 2016 STANDARD-TIMES (TX) article in the "Local Sports | High School Football" section entitled "Hudl's internet technology changing coaches' lives," describing Opposer's service as the one "most West Texas high school football coaches use to video their games and exchange videos with upcoming opponents via the internet," and discussing the use of Opposer's services by coaches (15 TTABVUE 214-17); an August 29, 2016 GREENWICH SENTINEL (CT) article discussing use of Opposer's video technology by a Connecticut high school football team and its coach (15 TTABVUE 218-21); a July 22, 2016 INFORMATIONWEEK article regarding growth of Opposer's service on Amazon (15 TTABVUE 222-26); a

June 18, 2015 LINCOLN JOURNAL STAR article entitled “Hudl HQ to be one of biggest office buildings constructed downtown in years” (15 TTABVUE 227-29); a May 27, 2015 OMAHA WORLD-HERALD article regarding Opposer’s Australian acquisition (15 TTABVUE 230-32); and an April 2, 2015 VOX.COM article discussing Opposer’s funding (15 TTABVUE 233-34).

This is not the sort of media coverage that supports a finding that a mark is a “household term.” See *TiVo Brands*, 129 USPQ2d at 1105 (discussing news articles describing the opposer’s TIVO mark “as having ‘near household-name recognition’” and as an “iconic brand”); *Chanel*, 110 USPQ2d at 2021 (discussing coverage of the opposer’s CHANEL mark in various publications in which the mark was “consistently ranked as one of the most recognized and famous brands in the United States”); *Nike*, 100 USPQ2d at 1024-26 (fame of opposer’s JUST DO IT mark evidenced by “third-party references to and discussions about the mark,” which “have been pervasive, reflecting the extreme popularity of the mark and the message of compelled action that it represents,” including numerous articles in well-known publications around the United States and listings of the slogan as among the most memorable slogans of the 20th Century).

Opposer also argues that it has “received recognition as one of the World’s 50 Most Innovative Companies and one of the 20 Most Promising Sports Technology Solutions Providers,” 30 TTABVUE 39; Shadley Test. Decl. ¶ 44, and as one of the World’s 50 Most Innovative Companies of 2016 by Fast Company. Shadley Test. Decl. ¶ 46. We have no information regarding the criteria for these awards, and Ms. Shadley does not discuss whether Opposer has done anything to publicize its receipt of them, or the extent, if any, of the general public’s awareness that Opposer has received them.

Without such context, her testimony about the awards establishes only that Opposer is viewed as innovative and successful by those who cover the sports technology industry. *Cf. Spier Wines (Pty) Ltd. v. Shepherd*, 105 USPQ2d 1239, 1245 (TTAB 2012) (the opposer’s receipt of industry awards and accolades for its goods did not show that its marks were famous for likelihood of confusion purposes “in the absence of evidence establishing the significance of the awards and knowledge thereof on the part of relevant U.S. purchasers . . .”).

The pre-May 3, 2018 media coverage of Opposer does not support a finding of actual recognition of the HUDL mark as famous.

**D. Registration of the HUDL Mark**

As discussed above, Opposer owns multiple registrations of HUDL and HUDL-formative marks. “Each mark registered on the Principal Register as an inherently-distinctive mark without resort to Section 2(f) or subject to a disclaimer,” *TiVo Brands*, 129 USPQ2d at 1112, and several of the registrations, including two of the three registrations of HUDL on which we focus, are over five years old and are not vulnerable to cancellation under Section 2(d) of the Trademark Act. This factor “favors a finding of dilution fame.” *Id.*

**E. Conclusion Regarding Fame of the HUDL Mark**

Three of the four non-exclusive factors probative of whether Opposer’s HUDL mark is famous do not support such a finding, and the single factor that does carries little weight in our analysis because many companies have substantial portfolios of registered marks, but only a very select few own registrations of famous marks. We

find that Opposer falls well short of showing that its HUDL mark is “famous” within the meaning of Section 43(c)(2)(A) of the Trademark Act.

**F. Conclusion Regarding Opposer’s Likelihood of Dilution Claim**

Because Opposer cannot satisfy the threshold requirement of fame under Section 43(c), it cannot prevail on its likelihood of dilution claim in each opposition.

**V. Section 2(d) Claim**

We turn now to Opposer’s other claim under Section 2(d) of the Trademark Act, which prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent or Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d).

**A. Priority**

In an opposition under Section 2(d), priority “may arise from a prior registration, prior trademark or service mark use, prior use as a trade name, prior use analogous to trademark or service mark use, or any other use sufficient to establish proprietary rights.” *DeVivo*, 2020 USPQ2d 10153, at \*3 (citing *Herbko Int’l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002)). Opposer argues that its “pleaded registrations (each of which issued long before the May 3, 2018 filing date of Applicant’s intent-to-use applications) establish Hudl’s priority for the goods and

services identified in these registrations.”<sup>19</sup> Because “Opposer properly made of record its valid and subsisting pleaded registrations and Applicant did not counterclaim to cancel them, priority is not at issue for the marks and the goods and services identified in each individual registration.” *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at \*9 (TTAB 2020) (citing *King Candy, Inc. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 82 USPQ 108 (CCPA 1974)).

Opposer also claims priority because “the evidence submitted establishes that [Opposer] commenced using its HUDL mark in 2008 and has continuously used it since that time in connection with its software, products, and services.” 30 TTABVUE 21. As discussed above, Opposer did not plead common law use of its HUDL mark, but instead limited its Notices of Oppositions to use of its registered marks, and we have given no consideration to this separate claim of priority.<sup>20</sup>

### **B. Likelihood of Confusion**

Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We

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<sup>19</sup> Opposer’s registrations need not have issued prior to Applicant’s date of first actual or constructive use of its mark, and Opposer’s registered marks need not have been used prior to those dates, because Section 2(d) permits opposition based simply on “a mark registered in the Patent and Trademark Office.” 15 U.S.C. § 1052(d). See *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 23 USPQ2d 1701, 1704 (Fed. Cir. 1992).

<sup>20</sup> In that regard, we note that Opposer’s Notices of Reliance allege that “neither Applicant nor a predecessor or related company made commercial use of the Opposed Mark before the date of any of the HUDL registrations.” 1 TTABVUE 12 (Not. of Opp. ¶ 13) (Opposition Nos. 91247770, 91248316, and 91248342).

consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). “[O]pposer has the burden of proving a likelihood of confusion by a preponderance of the evidence.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020).

We will focus our analysis on Opposer’s HUDL standard character mark, which is registered for various goods in Class 9 and various services in Classes 38, 41, and 42. If we find a likelihood of confusion as to the HUDL standard character mark and the goods and services identified in its three registrations, “we need not find it as to Opposer’s other registered marks; conversely, if we do not find a likelihood of confusion as to Opposer’s [HUDL] mark for [those goods and services], we would not find it as to Opposer’s other registered marks for the goods [and services] identified therein.” *New Era*, 2020 USPQ2d 10596, at \*9-10.<sup>21</sup>

Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). Both Opposer and Applicant address these key factors, 30 TTABVUE 23-24, 26-31; 31 TTABVUE 26-30, 31-36; 32 TTABVUE 6-11, but they do

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<sup>21</sup> Opposer’s other registrations are for marks that contain visual or verbal elements in addition to the word HUDL.

not stop there, as they both discuss the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and twelfth *DuPont* factors, and Applicant discusses the eleventh factor. We will consider each of these factors, bearing in mind that “[n]ot all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks*, 2020 USPQ2d 10341, at \*3 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

### **1. Strength or Weakness of Opposer’s HUDL Mark**

We begin with consideration of the fifth and sixth *DuPont* factors, both of which address the strength or weakness of Opposer’s HUDL mark, because they potentially bear on the extent of protection to which it is entitled. We may consider these factors in tandem, *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017), and doing so here makes particular sense because the parties are sharply at odds on these factors, with Opposer arguing under the fifth factor that the “evidence demonstrates that HUDL is a famous mark, deserving of a ‘wide latitude of legal protection,’” 30 TTABVUE 26, and Applicant arguing under the sixth factor that Opposer’s mark “should only be given an extremely narrow scope of protection due to the extensive number of similar ‘huddle’ marks used on various goods and services which are related to Opposer’s goods and services.” 31 TTABVUE 45 (emphasis in original).

#### **a. Strength of Opposer’s Mark**

“In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and, if there is evidence in the record of marketplace recognition of the mark, its commercial strength.” *New Era*, 2020

USPQ2d 10596, at \*10 (citations omitted). “The inherent or conceptual strength of Opposer’s [HUDL standard character] mark is not seriously at issue. Opposer’s mark is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act.” *Id.* (citing *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006)). The fact that a mark is inherently distinctive does not mean that it is inherently strong, but HUDL is only vaguely suggestive of the sports-related nature of Opposer’s software and video goods and services, and, as discussed below, there is only “minimal evidence of registrations of marks comprised of [HUDL or HUDDLE] for the same or similar goods that might demonstrate the inherent weakness of [HUDL] as a source identifier.” *Id.* We find that HUDL is conceptually strong for the goods and services for which it is registered. The parties’ dispute pertains principally to the commercial strength of the mark.

“Commercial strength or fame is the extent to which the relevant public recognizes a mark as denoting a single source.” *Id.* If such commercial strength or fame exists, it “plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use.” *Id.* “Because of the extreme deference that we accord a famous mark in terms of the wide latitude of legal protection it receives,” and the “dominant role fame plays in the likelihood of confusion analysis, it is the duty of the party asserting that its mark is famous to clearly prove it.” *Id.*

We have found above that Opposer’s HUDL mark is not famous for purposes of its dilution claim, but that finding does not preclude a showing that HUDL is famous under Section 2(d) because “[t]he commercial strength or fame of a mark is not a binary factor in the context of a likelihood of confusion analysis.” *Id.* (citing *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017)). “While dilution fame is an either/or proposition—fame either does or does not exist—likelihood of confusion fame varies along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734 (citing *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed Cir. 2005)). “[A] mark can acquire ‘sufficient public recognition and renown to be famous for purposes of likelihood of confusion without meeting the more stringent requirement for dilution fame.’” *Coach Servs.*, 101 USPQ2d at 1724 (quoting *7-Eleven*, 83 USPQ2d at 1722). At the same time, it is admittedly more difficult to place the HUDL mark at some point “along a spectrum from very strong to very weak,” *Joseph Phelps Vineyards*, 122 USPQ2d at 1734, than it is to decide whether or not it has achieved dilution fame.

Commercial strength or fame may be measured indirectly by the volume of sales and advertising expenditures in connection with the goods or services sold under the mark, and supported by other indicia such as length of time of use of the mark; widespread critical assessments; notice by independent sources of the goods or services identified by the marks; and the general reputation of the goods or services.

*New Era*, 2020 USPQ2d 10596, at \*10-11. Opposer cites several of these forms of indirect evidence in support of its claim of fame under Section 2(d), including the

same evidence of the volume of advertising of goods and services under the HUDL mark, the length of its use, and publicity in the media, that it cited in support of its claim that HUDL has achieved dilution fame. 30 TTABVUE 25-26.<sup>22</sup> Opposer concludes that “[i]f a person has been in high school sports in the last five plus years, or they have family who has been, they are very likely familiar with HUDL software. And even among those not directly involved in sports, the HUDL mark has achieved widespread recognition and fame,” *id.* at 26, and that “[t]he evidence demonstrates that HUDL is a famous mark, deserving of a ‘wide latitude of legal protection.’” *Id.* (quoting *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000)).

The Federal Circuit has held that in making the Section 2(d) fame determination, “the applicable viewpoint is that of the relevant market,” *id.* (citing *Palm Bay Imps.*, 73 USPQ2d at 1694), rather than that of the general public. The “relevant market” consists of purchasers of Opposer’s goods and services. *Palm Bay Imps.*, 73 USPQ2d at 1694 (“Fame for confusion purposes arises as long as a significant portion of the relevant consuming public, namely, purchasers of champagne and sparkling wine, recognizes the mark as a source indicator.”) According to Applicant, the purchasers of its goods and services include club and youth teams, high schools, colleges, and a number of professional sports teams, and the users of the goods and services within

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<sup>22</sup> Opposer claims that this evidence “is very nearly direct evidence of fame for Opposer’s HUDL marks,” 30 TTABVUE 25, but the difference between direct and indirect evidence of fame is one of kind, not degree. As Opposer acknowledges, “[d]irect evidence of fame, for example from widespread consumer polls, rarely appears in contests over likelihood of confusion,” *id.* (quoting *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1371 (Fed. Cir. 2002)), and it is not present in this one.

those entities are coaches, trainers, athletes, and recruiters. Shadley Test. Decl. ¶¶ 4, 11-12, 14, 17, 24, 27.

We have discussed Opposer's pre-May 3, 2018 evidence of fame above in rejecting Opposer's dilution claim, and will not repeat that discussion here, but we must discuss Opposer's additional evidence of fame that post-dates Applicant's May 3, 2018 filing date because it is relevant to our analysis of strength under the fifth *DuPont* factor. *See Gen. Mills, Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1595 n.13 (TTAB 2011), *judgment set aside on other grounds*, 2014 WL 343267 (TTAB Jan. 22, 2014) (evidence of fame considered up to the time of trial). That evidence includes Ms. Shadley's testimony regarding Opposer's 2018 and 2019 annual marketing budgets of \$7.4 million and \$8.7 million, respectively, Shadley Test. Decl. ¶ 53, and additional articles about Opposer and its goods and services. Shadley Test. Decl. ¶¶ 40-42, 50-51; Exs. 11-13; 21-22 (15 TTABVUE 130-53, 198-213, 236-75).

We turn first to the additional articles, which we summarize below.

A December 29, 2018 article in the PHILADELPHIA INQUIRER (inquirer.com) entitled "College football recruiting: Hudl has changed the landscape and 'evened the playing field'" discusses the use of Opposer's software to create videos by Philadelphia-area college recruiters and high school players and coaches. Shadley Test. Decl. ¶ 40; Ex. 11 (15 TTABVUE 130-35);

A July 31, 2019 article in THE DALLAS MORNING NEWS (dallasnews.com) entitled "Film breakthrough: How digital advances have revolutionized the scouting game for Texas high school football coaches" discusses the use of Opposer's technology by Texas high schools in game scouting and quotes one of Opposer's sales managers that Opposer's technology is used by 98% of U.S. high schools. Shadley Test. Decl. ¶ 41; Ex. 12 (15 TTABVUE 136-43);

A September 6, 2018 article in THE BOSTON GLOBE (bostonglobe.com) entitled “Technology changes how high school football coaches prepare their players” discusses the use of Opposer’s technology in Massachusetts high school football and states that “All but two of the 311 Massachusetts football programs pay \$800 for an annual Hudl subscription and approximately half of those programs pay an additional \$1,000 for Hudl assist, which provides faster turnaround and in-depth statistical analysis.” Shadley Test. Decl. ¶ 42; Ex. 13 (15 TTABVUE 144-53);

An April 7, 2019 article in BUSINESS TRIBUNE, a publication of Pamplin Media Group (pamplinmedia.com), entitled “TFNW19: Sensors and sensibility” discusses the TechFestNW and two addresses regarding the use of technology in sports, including Opposer’s technology and that of many other companies, and quotes one speaker as stating that it “was focused on the elite first, then suddenly it quickly hit the mainstream. It went to 100 percent of high school football teams in just five years.” Shadley Test. Decl. ¶ 50; Ex. 21 (15 TTABVUE 197-209);

A May 23, 2020 article in JOURNAL STAR (journalstar.com) entitled “Hudl CEO excited by sports world beginning to reopen” contains an interview with Opposer’s CEO about the hoped-for reopening of the company and the sports world amid the Covid-19 pandemic and how the pandemic increased the need for recruiting using Opposer’s technology. Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 236-43);

An August 19, 2020 article in SPORTTECHIE (sporttechie.com) entitled “The Pandemic is Accelerating a Shift in Youth Sports From a Hobby to a Profession” discusses the use of technology in connection with youth sports during the Covid-19 pandemic, mentions the use of Opposer’s technology in recruiting, and states that “Companies such as Hudl, Pixellot, Playsight and Keemotion will all play a role” in streaming high school games played without fans present. Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 244-50);

A September 6, 2020 article in the PITTSBURGH POST-GAZETTE (post-gazette.com) entitled “Live streams will be

big for Western Pennsylvania high school teams this fall” discusses the role of Facebook Live, YouTube, Hudl, Pixellot automatic cameras, and the National Federation of State High School Associations in streaming high school football games played without fans present. Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 251-59);

A September 11, 2020 article on website of Pittsburgh’s Action News 4 (wtae.com) entitled “High school football online is alternative to empty stadiums” discusses the playing of high school football in western Pennsylvania with limited live attendance and states that “Districts are turning to an online platform, like the one used by the Mars Area School District, called Hudl, that will stream the game live on YouTube. Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 260-63); and

An April 12, 2020 article in THE BOSTON GLOBE (bostonglobe.com) entitled “How has the coronavirus pandemic impacted college recruiting for high school athletes”? discusses the impact of the pandemic on recruiting and states that a high school girls’ basketball coach in Massachusetts “encourages his players to create highlight segments and a player profile on Hudl, a provider of video analysis at the high school and college level” and that Opposer “[w]ith approximately 29,000 of the nation’s 37,000 high school programs on Hudl, the Nebraska-based company has become the standard for scouts and recruiters” and is “also a way for coaches to provide instruction and stay connected to their players during this period of social distancing.” Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 271-75).<sup>23</sup>

Although several of these articles appeared in well-known publications, they share characteristics of most of the pre-May 3, 2018 articles in that they focus primarily on the usefulness of Opposer’s technology, particularly during the Covid-19 pandemic, and Opposer’s innovation and growth as a company, rather than on the notoriety of

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<sup>23</sup> A September 15, 2020 article on espn.com entitled “Top prospect Chet Holmgren the latest evidence of recruiting’s Minnesota takeover” is missing several pages and makes no mention of Opposer. Shadley Test. Decl. ¶ 51; Ex. 22 (15 TTABVUE 254-70).

the HUDL mark per se. The pre- and post-May 3, 2018 articles collectively reflect that Opposer has grown rapidly and successfully, and is now an integral part of coaching and recruiting at the high school level, but they have relatively little probative value in showing the strength of the HUDL mark on Opposer's likelihood of confusion claim. *Cf. Joseph Phelps Vineyards*, 122 USPQ2d at 1734-35 (strength of the opposer's mark shown in part by articles establishing "extensive recognition and accolade for INSIGNIA brand wine").

With respect to Opposer's post-May 3, 2018 advertising, Ms. Shadley did not testify about how Opposer's marketing budgets for any of the three years for which she provided figures compare with those of its competitors (or indeed even about who they are). Shadley Test. Decl. ¶ 53. The Federal Circuit has "consistently accepted statistics of sales and advertising as indicia of fame" under Section 2(d), and "when the numbers are large, [has] tended to accept them without any further supporting proof." *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1306 (Fed. Cir. 2002). *See also Promark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1245 (TTAB 2015) ("When the numbers are large, they may suffice to prove fame for likelihood of confusion purposes, assuming relevant contextual indicators support that conclusion.").

As in Opposer's dilution claim, however, Opposer's marketing numbers are nowhere near as large as those that have supported fame findings under Section 2(d) in multiple Federal Circuit and Board cases, including in two of the three Federal

Circuit cases cited by Opposer. 30 TTABVUE 25.<sup>24</sup> *See Bose*, 63 USPQ2d at 1306 (fame of ACOUSTIC WAVE mark supported by annual advertising expenditures of more than \$5 million over the 17 years of use of the mark prior to 2002);<sup>25</sup> *Recot*, 54 USPQ2d at 1896 (fame of the opposer’s FRITO-LAY mark shown by expenditures in 1996 of about \$80 million and other evidence, including the facts that “[i]n any given year, over 90 percent of American households purchase at least one FRITO-LAY brand product” and that “FRITO-LAY products enjoyed a greater than 50 percent market share in the estimated \$12.1 billion domestic snack chip industry.”). *See also Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1690 (Fed. Cir. 2018) (fame of OMAHA STEAKS mark supported by advertising expenditures of \$45 million in 2011 and over \$50 million in 2012 and 2013); *Kimberly-Clark Corp. v. H. Douglas Enters., Ltd.*, 774 F.2d 1144, 227 USPQ 541, 542 (Fed. Cir. 1985) (fame of HUGGIES mark supported by \$15 million in advertising in the year 1982 alone); *AutoZone Parts, Inc. v. Dent Zone Cos.*, 100 USPQ2d 1356, 1361-62 (TTAB 2011) (fame of AUTOZONE mark supported by advertising expenditures of over \$750 million during 23-year period of use, with the

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<sup>24</sup> In the third case cited by Opposer, *Palm Bay Imps.*, the Federal Circuit did not set forth specific numbers, but noted that the opposer’s “sales volume and advertising expenditures since 1990 have been substantial,” found that the opposer’s champagne was advertised in both general interest magazines and through what appeared to be all other media through which alcoholic beverages could be advertised, and noted that the applicant’s president had admitted that the opposer’s VEUVE CLICQUOT mark was famous. *Palm Bay Imps.*, 73 USPQ2d at 1695.

<sup>25</sup> These annual expenditures in *Bose* for the period 1985-2002 are comparable on their face to Opposer’s annual expenditures for the period 2017-2019, but the figures in *Bose* obviously would be much higher if they were expressed in current dollars.

Board finding that although petitioner had “not placed its sales and advertising figures in context,” such context was “not necessary here in view of the volume of sales and advertising expenditures and the fact that petitioner’s advertising reaches over 90% of the U.S. population numerous times each year.”). Because Opposer’s advertising figures are not nearly of the magnitude of the figures in these cases, “some context in which to place [Opposer’s] raw statistics is reasonable.” *Bose*, 63 USPQ2d at 1309.

The Federal Circuit has held that such context can take the form of market share, although that “is but one way of contextualizing ad expenditures or sales figures.” *Omaha Steaks*, 128 USPQ2d at 1690. Opposer provides some information regarding its market share (or, more accurately, sub-market shares). Ms. Shadley testified that Opposer’s “software products are presently used by more than 160,000 active teams worldwide, the vast majority of which are in the United States,” Shadley Test. Decl. ¶ 11, that “[b]y the end of 2017, there were more than 58 million unique users of HUDL software (e.g., coaches, trainers, athletes, and recruiters), the vast majority of which are in the United States, and that number has continued to grow,” Shadley Test. Decl. ¶ 12, and that “[t]here are presently at least 6 million unique registered users of HUDL software (e.g., coaches, trainers, athletes, and recruiters), the vast majority of which are in the United States.” Shadley Test. Decl. ¶ 12. She also explained that Opposer’s “products, software and services are used by teams across more than 35 different sports, including but not limited to baseball, basketball, bowling, cross country, diving, fencing, field hockey, football, golf, gymnastics, ice

hockey, lacrosse, rowing, rugby, skiing, soccer, softball, swimming, tennis, track and field, volleyball, water polo, and wrestling.” Shadley Test. Decl. ¶ 18.

Ms. Shadley testified that “[a]t the professional level, by 2017, Hudl’s software products and services had been adopted by several [NFL] teams, six [NHL] teams (a number that stands at eleven today), and all but one of the thirty [NBA] teams,” Shadley Test. Decl. ¶ 14, and that Opposer’s “software is also used by all the United States National Soccer Teams.” Shadley Test. Decl. ¶ 15. She provided no information regarding the use of Opposer’s goods and services by professional leagues, teams, or athletes in any other professional sports in the United States, such as baseball, bowling, golf, lacrosse, rugby, soccer, tennis, or volleyball.

It is not clear how much, if any, of Opposer’s advertising budget is directed to the “professional level.” Shadley Test. Decl. ¶ 14. Although Opposer’s market share is nearly 100% with respect to teams in the NBA, it appears to be quite modest with respect to teams in the NFL and NHL, and there is no evidence of any market share with respect to other professional sports in the United States.

Ms. Shadley testified that Opposer’s “greatest success, however, may be at the collegiate and high school levels.” Shadley Test. Decl. ¶ 16. She testified that “high school and youth athletes, as well as underage college athletes, account for a significant percentage of Hudl’s registered users,” Shadley Test. Decl. ¶ 73,<sup>26</sup> but she provided no information about the number of youth and college teams or athletes that

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<sup>26</sup> In the context of Ms. Shadley’s testimony, the reference to “underage college athletes” appears to be a reference to college athletes under the legal drinking age, which is generally 21.

use Opposer's goods and services, or how much, if any, of Opposer's advertising budget is directed to those sub-markets.

She testified that 99% of high schools in the United States use Opposer's software, and that "this percentage has been in the high 90s for a number of years (well before 2018)." Shadley Test. Decl. ¶ 17. According to Ms. Shadley, "[t]his translates to more than 102,000 high school teams, 405,000 high school coaches, and 1.8 million high school athletes in the United States using HUDL software," Shadley Test. Decl. ¶ 17, and the "hub" that Opposer provides "is the largest community in high school sports." Shadley Test. Decl. ¶ 24. Among high schools, Opposer's market share for its goods and services appears to be nearly 100%, an extraordinary figure.

In *Omaha Steaks*, the Federal Circuit held that evidence other than market share could also give context to advertising and sales figures. The court found that the opposer had "provided considerable contextual evidence of the type of advertisements and promotions it uses to gain sales," *id.*, including "catalog and direct mail, a daily email blast, customer calls, and on social media platforms," a "direct mail advertising program," "national radio and television campaigns, free-standing print campaigns, and mention in national magazines, including *Time*, *Newsweek*, *Playboy*, and *PC Magazine*, and newspapers, including *USA Today*, the *Wall Street Journal*, the *New York Times*, and the *LA Times*," "TV promotions of goods and services under the Omaha Steaks mark, on the following TV shows: 'Fox & Friends,' 'Hell's Kitchen,' 'Celebrity Apprentice,' and 'The View,'" "features of Omaha Steaks products on 'The

Oprah Winfrey Show,’ ‘The Ellen DeGeneres Show,’ ‘Food Factory,’ ‘Unwrapped,’ and ‘Military Makeover,’” and “unsolicited movie and TV allusions to Omaha Steaks.” *Id.*

Although Opposer has a significant presence on social media, and has enjoyed some mentions in articles in various publications,<sup>27</sup> Ms. Shadley did not specify the nature or extent of Opposer’s “traditional print and online advertising,” Shadley Test. Decl. ¶ 61, and there is no evidence that Opposer has ever advertised on television or in the other manners discussed in *Omaha Steaks*. As noted above, there are also no sales and revenue figures in the record. The record is thus quite thin on the sort of contextual evidence discussed in *Omaha Steaks* that would enable us to determine the significance of any advertising directed to Opposer’s professional, college, and youth team sub-markets between 2017 and 2019. Because Opposer’s aggregate figures are not “large” in comparison to the figures in other cases, we cannot give significant weight to Opposer’s advertising as evidence that its mark is famous for likelihood of confusion purposes in all of Opposer’s various sub-markets.

The record shows that Opposer has achieved virtually a 100% market share among high school teams, coaches, trainers, and athletes. With respect to Opposer’s high school sub-market, we find that the HUDL mark “falls on the much higher end of the commercial strength spectrum ‘from very strong to very weak.’” *New Era*, 2020 USPQ2d 10596, at \*12 (citing *Joseph Phelps Vineyards*, 122 USPQ2d at 1734). With respect to teams, coaches, and athletes at the professional, college, and youth levels,

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<sup>27</sup> The media coverage of Opposer has focused heavily on the use of Opposer’s goods and services by high schools teams, coaches, and athletes, not professional, college, or youth teams or athletes.

however, the record does not support a similar finding, and in these sub-markets we accord the HUDL mark only “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery*, 125 USPQ2d at 1347.

**b. The Number and Nature of Similar Marks in Use on Similar Goods and Services**

We turn now to the sixth *DuPont* factor, which “considers ‘[t]he number and nature of similar marks in use on similar goods.’” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *DuPont*, 177 USPQ at 567). “The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Id.* (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694).

Applicant introduced evidence of third-party uses and registrations of HUDDLE- and HUDL-formative marks. Third-party uses may bear on the commercial weakness of a mark, *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017), and may be “relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Omaha Steaks*, 128 USPQ2d at 1693 (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694). Third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services,” *Tao Licensing*, 125 USPQ2d at 1057, but not its commercial strength.

Applicant cites 28 uses of marks or names containing the word HUDDLE (or a variant) for what it describes as “software and video services,” 31 TTABVUE 20-23, 24 registrations of marks containing the word HUDDLE (or a variant) for what it

describes as “goods and services identical or highly related to Opposer’s goods and services,” *id.* at 15-20,<sup>28</sup> and 10 “registered trademarks and common law uses of the word ‘hudl.’” *Id.* at 23-24. Applicant argues that “Opposer’s mark Hudl is simply a shortened version of the common word ‘huddle,’” *id.* at 25, which Applicant claims “has been a part of football, as well as other sports, for more than 100 years,” *id.*, and has been defined in the context of football as “a brief gathering of players away from the line of scrimmage to receive instructions (as from the quarterback) for the next down.” *Id.* Applicant claims that “Opposer’s Marks should only be given an extremely narrow scope of protection due to the extensive number of similar ‘huddle’ marks used on various goods and services which are related to Opposer’s goods and services.” *Id.* at 45.

Opposer’s position is that “[w]hile Applicant has clearly scoured the USPTO’s database and Internet searching for any evidence that Hudl’s mark may be weak, it came up short.” 30 TTABVUE 34. Opposer argues in its main brief that the third-party uses and registrations of HUDDLE marks are irrelevant to the strength or weakness of its HUDL mark because they “use the English word ‘HUDDLE,’ not the coined term ‘HUDL’ used by Hudl and prominently featured in the applied-for marks.” *Id.* Opposer similarly argues in its reply brief that “Applicant has attempted to introduce a laundry list of registered and unregistered ‘Huddle’ marks or uses that

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<sup>28</sup> Opposer correctly notes that two of the registrations made of record by Applicant for the marks HUDDLER, and HUDDLER and design, were cancelled in November 2020, a week after Applicant made them of record. 30 TTABVUE 34 n.6; 28 TTABVUE 2-12. Applicant does not list them in its brief, and we have not considered them because “‘dead’ or cancelled registrations have no probative value at all.” *In re Embiid*, 2021 USPQ2d 577, at \*35 n.48 (TTAB 2021) (quoting *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 (TTAB 2011)).

are simply irrelevant to the strength of Opposer’s HUDL marks.” 32 TTABVUE 13. These arguments are based primarily on the fact that “Applicant itself—during prosecution of the applied-for marks—distinguished the term ‘HUDL’ from marks cited by the Examining Attorney containing the term ‘HUDDLE,’ noting that the term HUDL ‘is arbitrary with no specific meaning.’” 30 TTABVUE 34 (quoting Applicant’s February 26, 2019 Response to Office Action in the ’637 Application (18 TTABVUE 25-34)).<sup>29</sup> Opposer exaggerates a bit because Applicant took this position in only one of the three involved applications,<sup>30</sup> but we will consider the possible impact of Applicant’s arguments made during prosecution of the ’637 Application that Applicant’s mark HUDL for clothing was not likely to be confused with the marks HUDDLE HAT and HUDDLE in registrations for helmet shaped hats with a facemask because, inter alia, the “marks have completely dissimilar commercial connotations due to Applicant’s mark using a coined term HUDL and including the distinctive arbitrary terms BREWING COMPANY,” 18 TTABVUE 31, and that the “coined term, HUDL, is arbitrary with no specific meaning.” *Id.* at 33.<sup>31</sup>

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<sup>29</sup> It was unnecessary for Opposer to make the response of record because, as noted above, the entire file history of the ’637 Application is automatically of record.

<sup>30</sup> There was no citation of a HUDDLE mark against the ’654 Application, which was published for opposition following Applicant’s disclaimer of BREWING COMPANY. Like the ’637 Application, the ’622 Application was refused on the basis of Registration No. 4363130 of the mark HUDDLE for various goods, including beer, August 30, 2018 Office Action at TSDR 1-5 (’622 Application), but Applicant responded by filing a petition for cancellation of the cited registration, which was granted. February 20, 2019 Response to Office Action at TSDR 1-2 (’622 Application).

<sup>31</sup> Applicant made the alternative argument that “[e]ven if the Examining Attorney’s reading of the term HUDL as ‘huddle’ were adopted, the meaning of the mark in conjunction with ‘Brewing Company’ would bring to mind more common definitions of ‘huddle’ such as to gather together in a close-packed group.” 18 TTABVUE 33. The citations of the HUDDLE HAT and HUDDLE marks were subsequently withdrawn “[b]ased on applicant’s response,”

Opposer's argument is unavailing to the extent that it seeks to estop Applicant from claiming at trial that third-party HUDDLE marks are probative of the weakness of Opposer's HUDL mark because "[t]he doctrine of 'file wrapper estoppel' does not apply in trademark cases." *Anthony's Pizza & Pasta Int'l, Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1281 (TTAB 2009), *aff'd*, 415 Fed. App'x 222 (Fed. Cir. 2010)). *See also Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 153 (CCPA 1978) ("a party's earlier opinion" on an issue "may be considered relevant and competent," but "[u]nder no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record."). But Applicant's arguments during prosecution of the '637 Application that HUDL is a "coined term" with "no specific meaning," and is thus dissimilar from HUDDLE, do "have significance as facts illuminative of shade and tone in the total picture confronting the decision maker." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.2d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (internal quotation marks and citations omitted). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014) ("A party's prior arguments may be considered as 'illuminative of shade and tone in the total picture,' but do not alter the Board's obligation to reach its own conclusion on the record."). We will consider Applicant's arguments against

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an amendment to the identification of goods, and the entry of a disclaimer of BREWING COMPANY. March 15, 2019 Examiner's Amendment at TSDR 1 ('637 Application). We do not know which of Applicant's alternative arguments persuaded the examining attorney to withdraw the citation.

the backdrop of the record as a whole—the “total picture”—taking into account both Applicant’s **and** Opposer’s positions on the issue of the derivation and meaning of the word HUDL.

“Coined” terms are “invented words” that are “created for the sole purpose of serving as a trademark.” 2 J. McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:5 (5th ed.) (June 2021 update) (“MCCARTHY”) (giving EXXON, CLOROX, VIAGRA, ZOCOR, and LIPITOR as examples of coined word marks). Notwithstanding Applicant’s arguments in the prosecution of the ’637 Application that HUDL is a “coined term,” which “is arbitrary with no specific meaning,” Applicant’s Manager testified at trial that HUDL is “a spelling variation of the word ‘huddle’ as the word huddle brings to mind a gathering of people.” Norfolk Decl. ¶ 7.<sup>32</sup> Ms. Shadley testified on summary judgment that Opposer “originally did business under the HUDDLE name and mark [but] in mid-2008, it switched to the HUDL name and mark,” Shadley SJ Decl. ¶ 5 (26 TTABVUE 6), belying Opposer’s argument that HUDL is a “coined term.” 30 TTABVUE 34. Given Opposer’s “switch” from HUDDLE to HUDL, the fact that Applicant expressly acknowledged that HUDL in its mark is “a spelling variation of the word ‘huddle,’” and the fact that there is no dispute that “hudl” can be pronounced as “huddle,” we find that the word HUDL in both parties’ marks is a truncated version or misspelling of HUDDLE, not an “invented” word created by either Opposer or Applicant out of thin air. Accordingly,

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<sup>32</sup> Applicant’s website urges customers to join the “Hudl Up Coin Club,” 18 TTABVUE 14, an obvious play on the expression “huddle up.”

we find that the third-party uses and registrations of HUDDLE should be considered for whatever probative value they may have in assessing the possible weakness of Opposer's HUDL mark, notwithstanding Applicant's arguments during prosecution of the '637 Application.

We begin with Applicant's 24 subsisting third-party registrations. As noted above, in the absence of proof of use of the registered marks, the registrations themselves have no value as evidence of the commercial weakness of Opposer's HUDL mark.<sup>33</sup> They may show, at most, that HUDL is conceptually weak if HUDL, or its antecedent HUDDLE, "is commonly registered for similar goods or services." *Tao Licensing*, 125 USPQ2d at 1057.

Three registrations involve marks which are different from either HUDL or its antecedent HUDDLE.<sup>34</sup> We find that these registrations are not probative of the conceptual weakness of Opposer's HUDL mark. *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019) (discussing limited probative value of registrations of words that are not identical to the words in the cited mark). Thirteen of the registrations cover services that are not identical to the athletics-related goods and services identified in Opposer's HUDL registrations, or that have not been shown to be related to those goods or services.<sup>35</sup> These registrations also have little or no probative value. *Id.*

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<sup>33</sup> As discussed below, Opposer proved use of some of the registered marks.

<sup>34</sup> These registrations are for the marks HUDDLY, HUDDLY and design, and HUDDLY GO (Registration Nos. 5801950, 5841312, and 6041268). 31 TTABVUE 18-20.

<sup>35</sup> These registrations are for the marks HUDDLE for "providing on-line facilities for real-time-peer-to-peer interaction with other computer users concerning personal coaching and

None of the third-party registrations cover services that are identical or demonstrably or even arguably related to those in Opposer's registrations of HUDL in standard characters. We summarize below the eight registrations (of six marks)

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professional coaching," with an exclusion of "the field of sports, athletics, or training for athletic competition," 31 TTABVUE 15; HUDDLESPACE for "electronic hubs with audio and video recording functions for connecting digital audio and video cables; matrix switchers with audio and video recording functions for digital audio and video signals; digital video recorders; sound mixers; digital video signal processors," "recorded computer software for saving and viewing digital images and video; downloadable computer software for saving and viewing digital images and video; computer peripheral devices," and "electronic publications, namely, books, magazines, manuals, pamphlets and brochures featuring movies, music, games, sports, entertainment and elementary education recorded on computer media," *id.* at 15-16; HUDDLESHOT for "video cameras; electronic switchers for video signals; video and audio/visual systems and components, namely, audio microphone mixers, and camera-and-microphone systems that capture, transmit, or record video and audio during meetings or presentations; video and audio/visual system controllers, namely, controllers that power on/off for, that select audio/video sources for, or that indirectly operate audio/video equipment, namely, video cameras, electronic switchers camera-and-microphone systems, components, cables, and peripherals; video and audio/visual systems and components consisting of cameras, controllers and software which provide automated camera tracking that can locate and/or follow a presenter," *id.* at 16; HUDDLE for "Providing online nondownloadable software for creating online workspaces that enable project management, file-sharing, document sharing, task assignment and tracking, scheduling, and general collaboration," *id.*; HUDDLECAMHD for "Cameras for use in web video conferencing," *id.*; HUDDLEBOARD for "Downloadable computer software for transmitting data, graphics, audio and/or video over electronics communications networks," *id.* at 17; VISUAL HUDDLE for "Providing temporary use of online non-downloadable software for . . . video collaboration and cloud-based managed video services, video and data via digital networks, computer software for video conferencing, collaboration and cloud-based managed video services; . . . Providing temporary use of online non-downloadable software for providing video, voice and recording capabilities on a secure, redundant and high capacity private global network enabling connectivity with Virtual Meeting Rooms (VMR) and which also enables content sharing compatible with mobile smartphones and tablets," *id.*; HUDDLEWALL for "Audio, video and data-sharing system for small group collaborations comprised of projectors, interactive whiteboards, digital pens, software for integrating the various components of the systems and users' manuals sold therewith together as a unit," *id.*; MYHUDLHEALTH for "computer software that enables communications via text messages, transmission of voice, video, data and electronic files through automated and agent assisted interactions between users and an enterprise," *id.* at 18; HUDDLE UP and HUDDLE UP NYC for "Organisation [sic] of sports events in the field of football; Arranging and conducting youth sports programs in the field of football," *id.*; and PIZZA HUDL and PIZZA HUDL and design for "fast-food restaurant services. *Id.* at 24.

that cover sports-related services that are arguably similar, on the face of the involved identifications, to the services identified in Opposer's registrations:

HUDDLE and TOPPS HUDDLE for "Providing information on sports through mobile devices," 31 TTABVUE 16;

HUDDLE HUB for "Internet broadcasting services," *id.* at 17;

THE MOMMA HUDDLE for "Education services, namely, providing classes, seminars and workshops in the fields of providing athletic information to parents; Educational and entertainment services, namely, a continuing program about providing athletic information to parents accessible by radio, television, satellite, audio, video and computer networks," *id.*;

JJHUDDLE.COM for "Providing news, information, reviews, and commentary via electronic communication networks, the Internet, and portable and wireless communication devices in the field of sports recruiting; promoting the interests of people involved and concerned with youth sports; promoting sports competitions and events," *id.* at 18 (Reg. No. 5226263); "Providing online electronic bulletin boards for transmission of messages among users in the field of sports; providing access to information on the Internet," *id.* (Reg. No. 5118171); and "providing a website featuring information in the field of sports," *id.* (Reg. No. 5118172); and

HOME OF THE HUDDLE for "Encouraging intercollegiate athletic programs by organizing and conducting educational programs and activities for intercollegiate athletes and alumni; Organizing and conducting college sport competitions and athletic events; Providing an interactive website featuring advice and information in the field of collegiate athletics programs." *Id.*

These third-party registrations are for marks that are not identical to HUDL, and that cover services that are only arguably related to the services for which the HUDL standard character mark is registered. We find that these registrations are

insufficient in both quality and quantity to show that the inherently-distinctive HUDL mark is conceptually weak. *Inn at St. John's*, 126 USPQ2d at 1746.

We turn now to Applicant's third-party use evidence, which consists of uses of HUDL (or variants) or its antecedent HUDDLE (or variants). In *Omaha Steaks*, the Federal Circuit reiterated that "the 'relevant *du Pont* inquiry is [t]he number and nature of similar marks in use *on similar goods*.'" *Omaha Steaks*, 128 USPQ2d at 1693-94 (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992)).

We begin with the third-party uses of HUDL and variants, which we summarize below:

Huddl for collaborative banking and investment application software, 21 TTABVUE 24, 45-47 offered under the tagline "Huddl Up to Power The Collective," *id.* at 45;

Huddl.ai for software system for organizing and conducting virtual meetings, *id.* at 16-18, 30;

Huddl as an acronym for "Hydrographic Universal Data Description Language," *id.* at 26; the "Houston Urban Debate League," 23 TTABVUE 7-17, 19; and the "Johns Hopkins Universal Design for Learning Institute," *id.* at 21;

My-Hudl for software for a "social network to find fun new things to do and places to go," 21 TTABVUE 49;<sup>36</sup>

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<sup>36</sup> This use, and various others in the record, are reflected in the results of a search using the Google search engine. Such search results are accompanied by a listing of "Similar" results to the right of the primary results, which provide links to other pages. The "MyHudl" results and others are accompanied by listings of "Similar" results that includes a listing of Opposer's HUDL app. 21 TTABVUE 32, 49. We do not know how this list or other lists of "Similar" results were generated, and thus do not have a basis for finding that the listing of Opposer's HUDL app indicates that those goods are related to the particular goods reflected in the primary search results. *Cf. In re Consumer Protection Firm PLLC*, 2021 USPQ2d 238, at \*19 (TTAB 2021) ("We are not privy to GOOGLE's page ranking algorithm, and we cannot simply

Huddl for a video-based social network that “will allow users to ‘discover video conversation serendipitously,’” *id.* at 28;

Huddl Booth for “A Modern Photo Booth Rental Company,” which creates “photo booths” for events, *id.* at 20;

PizzaHuddl for a pizza restaurant, *id.* at 23-24, and Huddl Fan Club for the restaurant’s club for discounts and rewards, *id.* at 23-24; and

Tesco Huddl for computer hardware and an Android tablet. *Id.* at 26-28.

Applicant has not shown that the goods and services with which these HUDL-formative marks are used are “identical or highly related to Opposer’s goods and services.” 31 TTABVUE 20. “[M]arks featuring [HUDL] on unrelated goods [and services] are properly understood as having no real probative value for the analysis at hand,” and are essentially irrelevant. *Omaha Steaks*, 128 USPQ2d at 1695. We find that these third-party uses of HUDL-formative marks do not diminish the commercial strength of Opposer’s HUDL mark.

We summarize below Applicant’s evidence of third-party use of HUDDLE-formative marks:

HUDDLE for software for content management, file sharing, and social and mobile collaboration (huddle.net), 21 TTABVUE 32, 37;

HUDLE and HUDLE PLAY for an app used to book sports venue and events and for sports coach training for adults, *id.* at 34-35;

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assume that the order of appearance in search results is an indicator of the trademark significance of Applicant’s Proposed Marks.”).

HUDLE PARTNER for an app for management of sports venues, *id.* at 39;

HUDDLE VIDEO for videoconferencing and meetings, marketed in connection with the tagline “Huddle Up!,” *id.* at 41-43;

HUDDLE and HUDDLE HOST for a “digital tool to help your sports organization propel into the digital age,” 22 TTABVUE 8;

HUDDLE UP! on the website of the Fellowship of Christian Athletes for a “global digital gathering-an online ‘Huddle’,” during the Covid-19 pandemic, for “coaches and athletes around the world, who are searching for connection and sports-related content,” accessible through the FCA’s YouTube channel, *id.* at 10-11;

“In the Huddle With Tony Romo” for a 2020 special interview show with former NFL quarterback Tony Romo, *id.* at 13;

Nittany Sports Huddle, Sports Huddle, and Penn State Huddlecast for sports broadcasting and other services provided by Pennsylvania State University, *id.* at 22;

No Huddle Sports for a sports website, *id.* at 24-25;

Sports Huddle for a YouTube channel featuring sports, *id.* at 27;

Prep Huddle Live for a website featuring high school sports, *id.* at 29;

Sunday No Huddle for a sports show regarding University of Illinois athletics, *id.* at 31-33;

The Sports Huddle for a sports radio show, *id.* at 35-37;

Army Football Huddle for a Facebook video regarding West Point football, *id.* at 39;

Badger Huddle for an “Armchair Pre-Game video series” about University of Wisconsin football, *id.* at 41-42;

High School Huddle for a website featuring videos of high school football, *id.* at 44; and

Hotard Huddle for a website about football. *Id.* at 46-47.

Most of these uses are sport-related, which is unsurprising given the meaning of “huddle” in connection with sports, particularly football. To that extent only, they are closer in subject matter to the goods and services offered by Opposer under the HUDL mark than the HUDL uses discussed above. But even if we found that all of them were similar to Opposer’s services under the standard set forth in *Omaha Steaks*, we would not “find the evidence sufficient to establish that the terms [HUDDLE or HUDL] have a descriptive significance or are in such widespread use that consumers have come to distinguish marks containing them based on minute differences.” *Bell’s Brewery*, 125 USPQ2d at 1347. These marginally-related third-party marks are a far cry in quality and quantity “from the large quantum of evidence of third-party use and registration that was held to be significant in” the Federal Circuit’s seminal third-party mark decisions in *Juice Generation* and *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015). *See Inn at St. John’s*, 126 USPQ2d at 1746. We find that the sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

**c. Summary Regarding Strength of Opposer’s HUDL Mark**

When used in connection with the goods and services identified in Opposer’s registrations of the HUDL standard character mark, the mark is quite strong in the high school sports sub-market, and of average strength in other sub-markets, and its strength has not been diminished by third-party uses of HUDL- and HUDDLE-formative marks. The fifth *DuPont* factor supports a finding of a likelihood of confusion in each opposition.

## 2. Similarity or Dissimilarity of the Marks.

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721 (internal quotation marks and citation omitted)). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018) (citations omitted).<sup>37</sup>

Opposer’s pertinent mark is HUDL in standard characters, and Applicant’s mark is HUDL BREWING COMPANY in standard characters. Opposer argues that “[w]hile Applicant seeks to register HUDL BREWING COMPANY, the dominant

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<sup>37</sup> The goods broadly identified in the ’654 Application as “Beverage glassware,” “Cups,” “Drinkware,” and “Mugs,” and in the ’637 Application as “Jackets,” “Shirts,” “Socks,” “Underwear,” and “T-shirts,” are used in some form by virtually all members of the public, and the average customer for those goods is thus an ordinary consumer. *See Embiid*, 2021 USPQ2d 577, at \*11. The average customer for the goods identified in the ’622 Application as “Beer, ale, lager, stout and porter” is an ordinary consumer of legal drinking age who drinks beer. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016).

portion of the HUDL BREWING COMPANY mark is unquestionably its lead term— ‘HUDL,’” which is “identical to Opposer’s HUDL mark.” 30 TTABVUE 23. According to Opposer, the marks are similar because Opposer’s mark and the dominant portion of Applicant’s mark “are spelled the same, visually identical, likely to be pronounced the same, and create the same commercial impression.” *Id.* at 24.

Applicant responds that when “Applicant’s Marks and the Opposer’s Marks are considered in their entirety and viewed and compared as a whole, they are dissimilar in appearance, sound, and most importantly, commercial impression.” 31 TTABVUE 27. Applicant argues that they are dissimilar in appearance because “[w]hile both Applicant’s and Opposer’s marks contain the term Hudl (a shortened version of the word Huddle), Applicant’s Marks prominently includes the words BREWING COMPANY,” which are “completely absent from Opposer’s Marks.” *Id.* at 28.<sup>38</sup> Applicant argues that the “mere fact that ‘BREWING COMPANY’ is disclaimed does not mean those words can be ignored in the likelihood of confusion analysis,” *id.*, that “[f]rom a visual standpoint, there is a distinct difference in appearance between the Applicant’s Marks and each of the Opposer’s Marks in their entirety” and that “a customer seeing the respective marks would not confuse Applicant’s Marks for any of the Opposer’s Marks.” *Id.* at 29.

With respect to sound, Applicant argues that “when spoken, the Applicant’s Mark and the Opposer’s Marks are dissimilar sounding” because “Opposer’s Marks contain

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<sup>38</sup> Applicant’s arguments on the dissimilarity of the marks in the several means of comparison are directed to all of Opposer’s pleaded marks. We focus on those arguments as they apply to Opposer’s HUDL standard character mark.

either one (1) or two (2) words and either two (2), three (3), or four (4) syllables” and “[b]y contrast, when spoken the Applicant’s HUDL BREWING COMPANY mark contains three (3) words and seven (7) syllables.” *Id.*

As to meaning, Applicant argues that “Opposer’s mark, HUDL, a shortened form of the word ‘huddle’ brings to mind a sports huddle or sports in general,” and that “[i]n contrast, Applicant’s Mark, HUDL BREWING COMPANY, with the noticeable additional words BREWING COMPANY, has an entirely different commercial impression,” that of a “company whose primary business is brewing and selling beer.” *Id.* Applicant acknowledges that the words BREWING COMPANY are descriptive, but argues that “consumers will rely on this term for purposes of easily distinguishing Applicant’s Mark and Opposer’s Marks . . . .” *Id.* (emphasis in original).

Applicant further argues that the different commercial impressions are “reinforced when the respective marks are considered in connection with their respective goods [and] services.” *Id.* Applicant contends that in the context of the goods and services identified in Opposer’s registrations, “the commercial impression of Opposer’s Marks using the highly sports suggestive ‘hudl’ marks, is that the goods and services are related to sports, sports training, and sports videos,” *id.* at 30, while Applicant’s mark connotes “beer, clothing, and beverageware from a brewery.” *Id.* Applicant concludes that its marks “do not ‘convey the same idea’ or ‘stimulate the same mental reaction’ as Opposer’s Marks” and that “Applicant’s Marks have a significantly different connotation and overall commercial impression distinct from Opposer’s Marks.” *Id.*

In its reply brief, Opposer reiterates its argument that HUDL is the dominant portion of Applicant's mark and drives the mark's similarity to Opposer's HUDL mark, focusing on "the use Applicant has commenced making of the applied-for mark," 32 TTABVUE 7, as shown on Applicant's website and social media pages, in which Opposer argues that "Applicant consistently uses the four-letter word HUDL in huge and prominent lettering with the miniscule words BREWING COMPANY underneath." *Id.* at 7-8.

Applicant is correct that the marks must be considered in their entirety, but "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)). We agree with Opposer that the word HUDL is the dominant portion of Applicant's mark. HUDL is the first element of Applicant's mark and that "is particularly significant because consumers typically notice those words first," *id.* at 1049, and the words BREWING COMPANY have been disclaimed because they are "descriptive insofar as they merely describe the business form of the entity that owns the mark." *Id.* We further agree with Opposer that Applicant's own use of the mark on its website, social media pages, and goods, an example of which is displayed again below, indicates that Applicant recognizes that HUDL is the source-identifying element of its mark, the portion that is "likely to

make a greater impression upon purchasers, to be remembered by them, and to be used by them to request [Applicant's] goods." *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018).



18 TTABVUE 14. We turn now to the required comparison of the pertinent marks in their entireties, giving greater weight in that comparison to the word HUDL in Applicant's mark than to the words BREWING COMPANY.

The marks are more similar than dissimilar in appearance, particularly taking into account that as a standard character mark, Applicant's mark "could be used in any typeface, color, or size, including the same stylization actually used or intended

to be used by [Opposer], or one that minimizes the differences or emphasizes the similarities between the marks.” *Anheuser-Busch, Inc. v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). Under this principle, we must assume not only that Applicant will display its mark as it already does, with the word HUDL appearing in much larger lettering above the words BREWING COMPANY, which “minimizes the differences” between the marks, *id.*, but also that Applicant will display the word HUDL (in that arrangement or in others) in the lowercase font in which Opposer’s HUDL mark has been used on its website and in videos, which depiction “emphasizes the similarities between the marks.” *Id.*

With respect to sound, the shared word HUDL, which Applicant argues will be verbalized as “huddle” in Opposer’s mark, 31 TTABVUE 25, and which Applicant’s Manager Dale Norfolk testified is “a spelling variation of the word ‘huddle’” in Applicant’s mark, Norfolk Decl. ¶ 7, will sound identical when the marks are spoken. The marks will be identical in sound to the extent that consumers of Applicant’s goods indulge in “the penchant of consumers to shorten marks.” *Bay State Brewing*, 117 USPQ2d at 1961 (finding that TIME TRAVELER and TIME TRAVELER BLONDE for beer were “virtually identical in sound”). *See also Aquitaine Wine USA*, 126 USPQ2d at 1188 (“consumers often have a propensity to shorten marks” when ordering goods or services orally). “[I]t is reasonable that such a practice would lead many consumers to drop the highly descriptive/generic term [BREWING COMPANY] when calling for Applicant’s goods,” and refer to Applicant and its goods by the word

HUDL alone. *Bay State Brewing*, 117 USPQ2d at 1961. But even if consumers verbalized Applicant's mark as HUDL BREWING COMPANY or HUDL BREWING, it would still be more similar than dissimilar in sound to Opposer's HUDL mark because of the presence of the identical sounding word HUDL at the beginning of each mark.

Finally, with respect to connotation and commercial impression, we have found that the word HUDL that comprises Opposer's mark in its entirety also dominates Applicant's mark, and "there is nothing about the nature of the respective products [and services] that would suggest [HUDL] would have a different meaning, or create a different commercial impression, when used on Applicant's goods, as compared to [Opposer's] goods [and services]. *Bay State Brewing*, 117 USPQ2d at 1961. The word HUDL in both parties' marks is derived from the word "huddle," and alludes to sports, and, as noted above, Applicant's website uses a play on the expression "huddle up." 18 TTABVUE 14.

The identical meaning of the word HUDL in the marks does not end our analysis, of course, because "the mere fact that [BREWING COMPANY was] disclaimed does not give [us] license to simply ignore those words in the likelihood of confusion analysis." *Detroit Athletic Co.*, 128 USPQ2d at 1050. The disclaimed words BREWING COMPANY associate Applicant's mark with beer, a connotation that has no counterpart in Opposer's HUDL mark, but as discussed above, and as exemplified in Applicant's own use of its mark in connection with clothing, the word HUDL is the portion of Applicant's mark that is most likely to imprint itself on the minds of

consumers and to be remembered and used to refer to all of Applicant's goods, including clothing and beverage ware in addition to brewed alcoholic beverages. This provides a rational reason to conclude that the marks are more similar than dissimilar in connotation and commercial impression. *Id.* at 1050-51.

The HUDL and HUDL BREWING COMPANY marks are more similar than dissimilar in all means of comparison, and the first *DuPont* factor supports a finding of a likelihood of confusion in each opposition.

### **3. Similarity or Dissimilarity of the Goods and Services, and Channels of Trade**

The second *DuPont* factor “considers “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567),<sup>39</sup> while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567). *See also Stone Lion*, 110 USPQ2d at 1161-63.

#### **a. Similarity or Dissimilarity of the Goods and Services**

Applicant acknowledges that under the second *DuPont* factor, “the goods and services need not be identical or even competitive,” and that it is sufficient if they are “related in some manner and/or if the circumstances surrounding their marketing are

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<sup>39</sup> Each of the three applications covers one class of goods, with multiple goods in each class. To prevail as to the entire class in each application, Opposer need not show that there is a likelihood of confusion as to each of the identified goods because likelihood of confusion must be found as to each entire class (and thus as to each entire application) if it exists as to any good within the identification of goods in the class. *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

such that they could give rise to the mistaken belief that they emanate from the same source.” 31 TTABVUE 34 (quoting *Coach Servs.*, 101 USPQ2d at 1722). Applicant argues, however, that we are required to apply the analysis of relatedness discussed in *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2015), because “when the relatedness of the parties’ respective goods and services is not evident, well-known, or generally recognized, the Board will need to show ‘something more’ than the mere fact that the goods and services are used together, offered under the same mark, or sold by the same retailer to find that the parties’ goods and services are related.” *Id.* (citing *St. Helena Hosp.*, 113 USPQ2d at 1087). According to Applicant, the “bulk of Opposer’s argument regarding the relatedness of the parties’ goods and services revolves around the supposed intersection of Opposer’s streaming video services and Applicant’s beer, beverageware and clothing. These goods and services, however, are not generally recognized as being related. Opposer, therefore, must show ‘something more.’” *Id.* at 35. Applicant acknowledges that *St. Helena Hosp.* “specifically addressed the goods of one party and the services of another,” but “submits that even the portion of goods identified in Opposer’s Marks, namely computer hardware and software for video analysis, is so intrinsically tied to Opposer’s services, including its software as a service and its broadcast services that the ‘something more’ requirement of *In re St. Helena Hosp.* can be applied to both Opposer’s computer hardware software goods as well as its services.” *Id.* at 35-36. In its reply brief, Opposer does not address Applicant’s argument that *St. Helena Hosp.* applies here.

In *St. Helena Hosp.*, the Board affirmed a Section 2(d) refusal to register after finding that “[h]ealth care services, namely, evaluating weight and lifestyle health and implementing weight and lifestyle health improvement plans in a hospital-based residential program” were related to “printed manuals, posters, stickers, activity cards and educational worksheets dealing with physical activity and physical fitness” and “pre-recorded videocassettes featuring physical activity and physical fitness promotion programs” on the basis of “several examples of organizations that render health care services and distribute printed materials.” *St. Helena Hosp.*, 113 USPQ2d at 1086. The Federal Circuit found this rationale wanting because “[i]n situations like the present, in which the relatedness of the goods and services is obscure or less evident, the PTO will need to show ‘something more’ than the mere fact that the goods and services are ‘used together.’” *Id.* at 1087. The court held that “[w]hile we have applied the ‘something more’ standard in the past in the context of restaurant services, the rule is not so limited and has application whenever the relatedness of the goods and services is not evident, well known or generally recognized.” *Id.*

The “something more” standard in *St. Helena Hosp.* only applies to the relatedness of goods to services, and this case does not fit that scenario. As discussed above, the registrations of the HUDL mark on which we focus are not limited to services alone, as the ’808 Registration covers “Computer hardware and computer software programs for the integration of text, audio, graphics, still images and moving pictures into an interactive delivery for multimedia applications for use by athletic teams and athletic departments in preparation for athletic competitions,” in Class 9. Although

the bulk of Opposer’s arguments under the second *DuPont* factor is directed to the relatedness of the services identified in its registrations to Applicant’s goods, 30 TTABVUE 27-31; 32 TTABVUE 8-11, Opposer does discuss its software goods. In the final analysis, however, we need not decide whether the “something more” standard should be applied here because we find that none of Opposer’s goods and services are related to any of Applicant’s goods even under the conventional test for similarity discussed in *Coach Servs.*

In each opposition, Opposer argues that “[s]ports teams and sports entertainment organizations frequently use similarly branded items to promote team and organizations or show fan loyalty,” 30 TTABVUE 29,<sup>40</sup> and that “evidence of third-party registrations and usage reinforces the conclusion that Applicant’s goods are similar to the goods and services provided by Hudl.” *Id.* Opposer argues generally that there are many “examples of prominent registered marks used in connection with a combination of sports video broadcasting, computer software for video playback or for other sports applications, apparel, beverageware, or restaurant and bar services.” *Id.* Opposer concludes that

The upshot of all these registrations is clear—there are *many* marks that apply equally to the goods and services for which Hudl owns registered marks, as well as the goods for which Applicant seeks registration. This evidence strongly suggests that the goods and services offered by

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<sup>40</sup> Opposer also argues that “Hudl itself regularly makes t-shirts and apparel—as well as variety of other items, including glasses, mugs, sports bottles, and koozies—featuring the HUDL mark to promote Hudl and its goods and services and its has been doing this for years (well before Applicant filed the opposed intent-to-use applications.” 30 TTABVUE 29. As discussed above, we have given no consideration to Opposer’s unpleaded common law use of its HUDL mark on such goods that undergirds these arguments.

Hudl and Applicant are related, and confusion is likely if Applicant's registrations are allowed.

*Id.* at 31 (emphasis in original).

Applicant argues that Opposer's third-party registration evidence "is not significant and does not show that Applicant's goods are related to Opposer's software and services," 31 TTABVUE 34, and that "Opposer has simply not provided sufficient evidence to show that the parties' differing goods and services will be encountered by the same persons under circumstances that could give rise to the mistaken belief that they originate from the same source." *Id.*

Evidence of relatedness may include "copies of use-based registrations of the same mark for both" the goods identified in Applicant's three applications and the goods and services identified in Opposer's registrations, *In re Country Oven, Inc.*, 2020 USPQ2d 443903, at \*4-5 (TTAB 2020), and "[j]ust as we must consider the full scope of the goods and services as set forth in the application[s] and registration[s] under consideration, we must consider the full scope of the goods and services described in a third-party registration." *Id.*, at \*9. We turn now to our analysis of relatedness in each application.

**i. Opposition to '654 Application**

The goods identified in the '654 Application are

Beverage glassware; Bottle openers; Bottle stoppers specially adapted for use with wine bottles; Coasters, not of paper or textile; Corkscrews; Cups; Decanters; Dishware; Drinkware; Flasks; Glass stoppers for bottles; Growlers; Ice buckets; Mugs; Nut crackers; Pet feeding and drinking bowls; Pitchers; Portable beverage container holder; Shot glasses; Sports bottles sold empty; Vacuum bottle stoppers.

Opposer made of record six third-party registrations that cover goods that are either identical to the goods identified in the '654 Application or encompassed within them. These are Registration No. 1437972 of the mark ESPN for “mugs,” and “television broadcasting services” and “entertainment services, reporting and sports programming services rendered through the medium of television,” 18 TTABVUE 50-56;<sup>41</sup> Registration No. 6097006 of the mark LPGA AMATEUR GOLF ASSOCIATION for “beverage glassware” and other beverageware, and “downloadable video recordings” and “downloadable computer software for viewing databases of information, statistical information, and multimedia files in the field of golf,” *id.* at 106-09; Registration No. 5995127 of the mark UNIVERSITY OF GEORGIA and design for “beverage glassware” and other beverageware, and “downloadable . . . videos about collegiate sports via a website for entertainment purposes,” and “providing webcasts in the field of college athletics” and “Providing a website featuring non-downloadable text, photos, videos about collegiate sports,” *id.* at 114-16; Registration No. 4441066 of the mark MASTERS and design for “drinking glasses, cups, and mugs” and other beverageware, and “Broadcasting sporting events on television, radio, the Internet, digital communications networks, and cable; computer-aided electronic transmission and electronic delivery of voice, data, images, and messages in the field of sports, sporting events, sports tournaments, and sports

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<sup>41</sup> Opposer also argues that “the ESPN mark is used for sports programming and video entertainment services through the internet, as well as through the ESPN sports app.” 30 TTABVUE 30 (citing 18 TTABVUE 62-77). There is no corresponding evidence of use of the ESPN for beverageware or other goods.

entertainment via computer networks, interactive television, and the Internet,” *id.* at 122-26;<sup>42</sup> Registration No. 6125583 of the mark CRITICAL ROLE for “beverage glassware” and other beverageware, and “streaming of audio and video content via a global computer network,” *id.* at 131-33; and Registration No. 4647395 of the mark RED BULL for “mugs,” “drinking glasses,” and other beverageware, and “streaming of . . . audiovisual material via a global computer network.” *Id.* at 156-61.

Two of these registrations do not cover the services identified in the ’441 or ’399 Registrations. The services identified in Registration No. 1437972 as “television broadcasting services” and “entertainment services, reporting and sports programming services rendered through the medium of television” are expressly limited to television broadcasting, reporting, and programming, and thus do not encompass the services identified in the ’399 Registration as “Audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips; providing access to information, audio, and video via websites.” Giving the services identified in Registration No. 4441066 of the mark of the Master golf tournament as “broadcasting sporting events on television, radio, and the internet” their full scope, they must be construed as involving the broadcasting of live “sporting events on . . . the internet,” and the services identified in the ’399 Registration as

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<sup>42</sup> Opposer argues that this registration also covers “computer software for instructional and entertainment purposes pertaining to the game of golf and golf tournaments,” 30 TTABVUE 30, but those goods have been deleted from the registration. 18 TTABVUE 122.

“[a]udio and video broadcasting services over the Internet . . . featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances,” are expressly limited to “sports and athletic performances” recorded on videos. We find that Registration Nos. 1437972 and 4441066 are not probative of the relatedness of beverageware to the services identified in Opposer’s registrations.<sup>43</sup>

We find that four third-party registrations, unaccompanied by any evidence of use of the registered or other marks for the relevant goods and services, are insufficient to show that Applicant’s Class 21 goods and Opposer’s services in Classes 38 and 41 are related.<sup>44</sup> The second *DuPont* factor supports a finding of no likelihood of confusion in Opposition No. 91247770.

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<sup>43</sup> Because these registrations do not cover the services identified in the ’411 and ’399 Registrations, they are also not probative of the relatedness of those services to the Class 25 and Class 32 goods in Applicant’s other applications. With one exception, we do not discuss them further.

<sup>44</sup> In its reply brief, Opposer cites *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986), for the proposition that “twelve [registered] marks is more than enough” to show relatedness. 32 TTABVUE 9. In *Phillips-Van Heusen*, there were 13 third-party registration of marks for both clothing and restaurant services, as well as a registration owned by the cited registrant itself for restaurant services and a collateral good. *Id.* at 951. The evidence here is not comparable. Opposer also cites *In re Great Lakes Canning, Inc.*, 227 USPQ 483 (TTAB 1985), and argues that “the Board did not say how many third-party registrations existed ‘both for soft drinks and fruit juices,’ but supported its conclusion that purchasers would ascribe such goods to a single source by listing just three.” 32 TTABVUE 9-10 (citing *Great Lakes Canning*, 227 USPQ at 484). Opposer is correct that we do not know the number of third-party registrations in the record in that case, but the Board’s citation of three examples followed its statements that “we note, as did the Examining Attorney, that fruit and vegetable juices, on the one hand, and soft drinks, on the other, are both non-alcoholic beverages which can be consumed either as refreshing beverages or used as mixers for alcoholic cocktails,” that “soft drinks may be fruit-flavored,” that “both types of drinks are sold through such retail outlets as supermarkets and grocery stores to the same class of purchasers, namely, consumers,” and that “for these reasons, the Trademark Trial and Appeal Board and the Court of Customs and Patent Appeals have consistently held that goods of this nature are closely related.” *Id.* Here, Opposer does not cite a single case holding that its services are “closely related,” or related at all, to any of Applicant’s goods. Finally, Opposer argues that “more recently, the Federal Circuit has said that evidence that ‘a single

**ii. Opposition to '637 Application**

The goods identified in the '637 Application are “Aprons; Beachwear; Belts; Blouses; Hoodies; Jackets; Jerseys; Rainwear; Scarves; Shirts; Socks; Sweaters; Sweatshirts; Tank tops; Ties as clothing; Underwear; Polo shirts; Sport shirts; T-shirts.”

Opposer made of record third-party registrations of nine marks that cover goods that are either identical to the goods identified in the '637 Application or encompassed within them, as well as services.<sup>45</sup> They are Registration Nos. 4739342 and 3711233 of the mark YOUTUBE for various types of clothing, 18 TTABVUE 83-85, and, *inter alia*, “Downloadable software to enable uploading, posting, showing, displaying, tagging, . . . sharing and otherwise providing electronic media or information over the Internet and other communications networks; application program interface (API) that enables developers to integrate video content and functionality into websites,

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company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis.” 32 TTABVUE 10 (quoting *Hewlett-Packard Co. v. Packard, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). Opposer misreads and miscites *Hewlett-Packard*. We read the Federal Circuit’s reference to a “single company” not to hold that evidence that only **one** third-party company sells both the involved goods and services is enough to show relatedness, but rather to mean that a particular category of evidence (absent in that case) consisting of examples that the **same** company sells both the involved goods and services “is relevant to a relatedness analysis.” *Hewlett-Packard*, 62 USPQ2d at 1004. In any event, the court did not rely on third-party uses to reverse the Board’s finding that the involved goods and services were not related, but instead found that they were related based on the identifications in the involved application and registrations where “several of HP’s registrations cover goods and services that are closely related to the broadly described services that Packard Press seeks to register under the PACKARD PRESS mark.” *Id.* at 1005. Opposer does not argue, much less show, that the services identified in its registrations are intrinsically related on their faces to the goods identified in Applicant’s three applications.

<sup>45</sup> Opposer made of record two different registrations of the YOUTUBE mark that cover goods in one registration and services in the other.

software applications, and devices,” “Audio, video and multimedia broadcasting via the Internet and other communications networks,” and “Providing a website that gives computer users the ability to upload and share user-generated videos . . . on a wide variety of topics and subjects,” *id.* at 89-101; Registration No. 6097006 discussed above, *id.* at 106-09; Registration No. 5995127 discussed above, *id.* at 114-16; Registration No. 6125583 discussed above, *id.* at 131-33; Registration No. 5231236 of the mark O (stylized) for various types of clothing and “Broadcasting services, namely, transmission of video and audio programming via television, cable, satellite, radio, digital communications networks, and mobile devices,” *id.* at 138-41; Registration No. 6046382, owned by Major League Soccer, of a mark consisting of a trophy for various types of clothing and “entertainment services, namely, soccer exhibitions rendered live in a stadium, and . . . via the internet,” *id.* at 146-48; Registration No. 4647395 discussed above, *id.* at 156-61; Registration No. 5337286 of the mark UNITE & CONQUER for various types of clothing and “downloadable video clips from soccer games via mobile communication devices” and “providing sports and entertainment information accessible by means of radio, television, cable, satellite, audio, video, web-based applications, mobile phone applications and computer networks,” *id.* at 165-67; and Registration No. 4708911 of the soccer World Cup trophy, which covers various types of clothing and “providing a web site that provides player statistics and other information on sports performances in connection with sporting events and competitions.” *Id.* at 173-76. Opposer also argues that it has

partnered with Nike, as well as other apparel brands. 30 TTABVUE 29 (citing Shadley Test. Decl. ¶¶ 24, 65; Exs. 3, 35).

We find that Registration No. 6046382 does not cover Opposer's services because the services identified in that registration as "entertainment services, namely, soccer exhibitions rendered live in a stadium, and . . . via the internet" must be read to encompass the broadcasting of live events, and the services identified in the '399 Registration as "[a]udio and video broadcasting services over the Internet . . . featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances," are expressly limited to "sports and athletic performances" recorded on videos. We do not find that Registration No. 6046382 is probative of relatedness.

We find that registrations of eight third-party marks, again unaccompanied by evidence of use of the registered marks or other marks,<sup>46</sup> are insufficient to show that Applicant's Class 25 goods and Opposer's services in Classes 38 and 41 are related. The second *DuPont* factor supports a finding of no likelihood of confusion in Opposition No. 91248342.

### **iii. Opposition to '622 Application**

The goods identified in the '622 Application are "Beer, ale, lager, stout and porter." Opposer argues that the '441 Registration covers "[e]ducation and entertainment

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<sup>46</sup> As discussed above, we have excluded Opposer's evidence of common law of HUDL on clothing, and the fact that it has "partnered" with Nike and allowed Nike to display its mark on Opposer's website, Shadley Test Decl. ¶ 24; Ex. 3 (15 TTABVUE 76), does not show that consumers would attribute clothing bearing the HUDL BREWING COMPANY mark to Opposer.

services, namely, providing a website featuring audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances” and the ’399 Registration covers “[a]udio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips; providing access to information, audio, and video via websites,” and that “beer and sports videos are precisely the sort of goods that are likely to be encountered under the same circumstances or marketed to the same persons such that, given the similarity of the marks, those persons are likely to become confused as to their source.” 30 TTABVUE 27.

Opposer further argues that while it “does not compete in the alcohol business, there is a whole genre of bar—namely, sports bars—that are devoted to combining alcohol and watching sports and explicitly cater to sports fans,” and that the “cross-promotion and comingling of these products hardly stops there,” *id.* at 28, citing Super Bowl commercials for Budweiser beer, and sponsorship and marketing partnerships between sports leagues and beverage companies. *Id.* Opposer claims that it “is deeply involved in providing sports-related entertainment services,” *id.*, and that “to the majority of people familiar with the HUDL mark, it represents a form of sports entertainment.” *Id.* According to Opposer, “for most of its customers, [its] services exist in an ecosystem where sports and beer are constantly presented

together and the fans who watch highlight videos on [its] website are very likely to be the same people who head to a bar or brewery on game day.” *Id.*

As discussed above, Opposer also relies on third-party registrations. *Id.* at 29. Opposer specifically discusses Registration No. 4441066 and Registration No. 5231236 that cover both “beer” and “broadcasting sporting events on television, radio and the internet,” and “broadcasting services,” respectively. *Id.* at 30. Registration No. 4708911 also covers “beers” as well as “entertainment in the nature of soccer competitions,” “providing a web site that provides player statistics and other information on sports performances in connection with sporting events and competitions,” and “restaurant services.”

Applicant responds that

In arguing that Opposer’s goods and services are related to Applicant’s goods for beer, Opposer argues that its Class 38 and Class 41 services include sports videos and that people sometimes drink beer while watching sports and people who drink beer may be sports fans. Opposer also argues that beer commercials appear during sports broadcasts and that beer companies have sponsored sports and sports teams. Opposer concludes by suggesting that fans who watch highlight videos on Opposer’s website might be the same people who head to a bar on game day. These arguments do not make beer related to Opposer’s goods and services in any meaningful way. The fact that a person who watches a sports video may also buy a beer does not mean a consumer would believe that these goods and services emanate from the same source.

31 TTABVUE 33.

In its reply brief, Opposer argues that “not only are the consumers of beer and sports entertainment services, including sports videos and sports broadcasting services, a highly overlapping group, these goods and services are encountered under

the same circumstances by the same consumers, such that they are likely to become confused as to their source.” 32 TTABVUE 9.

Opposer’s position that its sports-related software and video goods and services are related to beer is illusory. There is no evidence of the use of the HUDL mark in connection with beer, whether through sponsorships, cross-promotions, or otherwise, and there is no evidence of any third-party use of marks for both beer and the services identified in Opposer’s registrations.

Opposer’s argument based on three third-party registrations covering “beer” is unavailing. These registrations also cover “broadcasting sporting events on television, radio and the internet,” “broadcasting services,” and “providing a web site that provides player statistics and other information on sports performances in connection with sporting events and competitions,” respectively.

Giving the services identified in the three third-party registrations their full scope, only two of them encompass the services identified in Opposer’s ’441 and ’399 Registrations,<sup>47</sup> while the third, Registration No. 4441066, does not for the reasons discussed above. Two third-party registrations covering both beer, and broadcasting

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<sup>47</sup> The “broadcasting services” identified in Registration No. 5231236 encompass the services identified in the ’399 Registration as “[a]udio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio and video clips; providing access to information, audio, and video via websites.” Similarly, the services identified in Registration No. 4708911 as “providing a web site that provides player statistics and other information on sports performances in connection with sporting events and competitions” encompass the services identified in the ’399 Registration as “providing access to information, audio, and video via websites” and in the ’441 Registration as “providing a website featuring audio clips, video clips, photographs, other multimedia materials, and information related to athletic and sports performances.”

and Internet services that are legally equivalent to those identified in the '441 and '399 Registrations, are insufficient to show that those goods and services are related.

Opposer offers nothing else beyond its arguments that beer is consumed and promoted in the context of viewing sports, and that “beer and sports (particularly sports as entertainment) are uniquely intertwined.” 30 TTABVUE 27-28.<sup>48</sup> Opposer’s argument that its “services exist in an ecosystem where sports and beer are constantly presented together,” *id.* at 28, is hyperbole. There is no evidence that the services identified in the '399 Registration as “Audio and video broadcasting services over the Internet or other communications network, namely, featuring the uploaded, posted, and tagged videos of others related to sports and athletic performances and electronically transmitting information, audio, and video clips” are consumed by coaches, trainers, athletes, family members, or fans in sports bars, and there is similarly no evidence that such viewers consume beer while viewing the “uploaded, posted, and tagged videos of others” in their offices or homes. The fact that sports broadcasting and beer might be consumed together in a sports bar does not answer the question of whether consumers will view beer and the type of “broadcasting services” identified in the '399 Registration as originating from a single source. In the absence of any contrary evidence, we find the answer to that question to be a

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<sup>48</sup> Opposer’s reliance on *Weider Publ’ns., LLC v. D & D Beauty Care Co.*, 109 USPQ2d 1347 (TTAB 2014), in support of these arguments is misplaced. In that case, the Board found that the applicant’s spa services were related to the opposer’s publications because “opposer has shown a close relationship between the types of articles that routinely appear in its SHAPE magazine and the services identified by applicant in its application.” *Weider Publ’ns.*, 109 USPQ2d at 1359. Opposer argues that “[t]he same logic applies here,” 30 TTABVUE 28, but there is no evidence that Opposer’s services have ever been associated with beer through the advertising of beer on Opposer’s website or in any other manner.

definitive “no,” particularly given Ms. Shadley’s testimony that “high school and youth athletes, as well as underage college athletes, account for a significant percentage of Hudl’s registered users,” such that “any perception that Hudl is affiliated with beer, alcohol, or drinking could do tremendous damage to Hudl’s reputation and business above and beyond just the harm that caused by confusion itself or by the dilution of Hudl’s mark.” Shadley Test Decl. ¶ 73. We can reasonably infer from Opposer’s aversion to any association with alcoholic beverages that consumers of its services are very unlikely to conclude that Opposer would “line extend” under its HUDL mark from its Internet broadcasting services into the sale of beer or the other goods in the ’622 Application, or affiliate itself with any entity in that industry through sponsorships or cross-promotions of the sort between professional sports leagues, teams, and broadcasters, and beer companies. The second *DuPont* factor supports a finding of no likelihood of confusion in Opposition No. 91248316.

**b. Similarity or Dissimilarity of the Channels of Trade**

The identifications of goods and services in Opposer’s registrations of HUDL and in Applicant’s three applications define the channels of trade and classes of consumers for those goods and services. *Stone Lion*, 110 USPQ2d at 1161-62. In all three applications, “[t]here are no limitations as to channels of trade or classes of purchasers in the identification[s] of goods,” and “[i]t therefore is presumed that [A]pplicant’s goods move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods.” *Id.* at 1161.

**i. Oppositions to '654 and '637 Applications**

Opposer's argument regarding the trade channels for the goods identified in these applications is a tautology: Such channels include "sales at stores (both brick and mortar and online) and at events and locales where clothing or beverageware might typically be sold." 30 TTABVUE 32. Opposer does not identify, much less submit evidence to show, where those goods "might typically be sold" beyond noting that "Applicant is already using its website to sell apparel branded with HUDL BREWING COMPANY . . . ." *Id.* Applicant argues that the normal channels of trade for clothing and beverageware "are clothing stores and stores selling home goods." 31 TTABVUE 36.

Opposer's argument that "[t]he parties are already using overlapping marketing channels" because Applicant promotes its goods on its website and Opposer "promotes its software and services online and distributes its highlight reels, videos, and content online, including via some of the social media platforms used by Applicant," 30 TTABVUE 32, is meritless. The Board has recognized for years that the "Internet is such a pervasive medium that virtually everything is advertised and sold through the Internet," *Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016) (quoting *Parfums de Couer, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1021 (TTAB 2007)), and that "the mere fact that goods and services may both be advertised and offered through the Internet is not a sufficient basis to find that they are sold through the same channels of trade." *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1743 (TTAB 2014) (quoting *Parfums de Couer*, 83 USPQ2d at 1021).

Opposer has not shown that its “software and services” are sold or rendered in any of the normal channels of trade for beverageware and clothing to the extent that they are established by the record as either “stores (both brick and mortar and online) and at events and locales where clothing or beverageware might typically be sold,” 30 TTABVUE 32, or “clothing stores and stores selling home goods.” 31 TTABVUE 36.

We find that the third *DuPont* factor weighs against a finding of a likelihood of confusion in Opposition Nos. 91247770 and 91248342.

**ii. Opposition to '622 Application**

Opposer argues that beer is sold “at professional sporting events, bars and restaurants, and grocery or retail stores that sell alcohol,” 30 TTABVUE 32, while Applicant argues that “beer is sold only in licensed bars, restaurants, and retail stores.” *Id.* (citing Cooper Decl. ¶ 4). The parties are thus essentially in agreement that, as the Board has previously found, the channels of trade for beer “include liquor stores, beer sections of grocery and convenience stores, and the like, as well as bars and restaurants . . . .” *Bay State Brewing*, 117 USPQ2d at 1960.

Opposer makes no effort in its main brief to explain why those channels overlap with the channels of trade for its software and video goods and services, 30 TTABVUE 32-33,<sup>49</sup> focusing instead on the alleged overlapping Internet channels of trade for its goods and services and Applicant’s clothing and beverageware, which we have found above do not exist to any meaningful degree. *Id.* Opposer does no better in its reply

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<sup>49</sup> To the extent that Opposer relies on its arguments that beer and sports broadcasting services are consumed together in sports bars and other venues to show that those goods and services have common trade channels, we find those arguments no more persuasive on the third *DuPont* factor than they are on the second.

brief, merely concluding that “the channels of trade for both Applicant’s and Hudl’s goods and services are unrestricted and overlap significantly.” 32 TTABVUE 13.

Applicant argues that the channels of trade for Opposer’s software goods are “Opposer’s own website and mobile app stores,” 31 TTABVUE 36, and that the channels of trade for Opposer’s software services are “Opposer’s own website and specialized servers that Opposer operates.” *Id.* at 37. We agree, and we find that there is no overlap between these channels of trade and the normal channels of trade for beer. The third *DuPont* factor weighs against a finding of a likelihood of confusion in Opposition No. 91248316.

#### **4. Purchase Conditions and Sophistication of Purchasers**

The fourth *DuPont* factor is the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Opposer argues that both its goods and services and Applicant’s goods “are targeted, at least in part, to unsophisticated consumers,” that Applicant’s goods “are relatively inexpensive—a beer may cost a few dollars and items like coasters, shot glasses, or t-shirts would not be much more,” and that “there is no reason to expect consumers would exercise any particular care in investigating the source of the products before purchasing or making use of them.” 30 TTABVUE 33. Applicant does not address the purchase conditions or the sophistication of the purchasers of its goods. 31 TTABVUE 37-39. In its reply brief, Opposer acknowledges age restrictions on the purchase of beer, but repeats that all of the goods in Applicant’s applications are “inexpensive goods.” 32 TTABVUE 11.

Opposer acknowledges that certain users of its software “such as coaches and team managers may be relatively sophisticated,” but argues that “its software is also used by youth and high schoolers, as well as tens of millions of sports fans,” 30 TTABVUE 33, who may care less about, and thus pay less attention to, the source of the software and the related videos. “Board precedent requires [our] decision to be based ‘on the least sophisticated potential purchasers,’” *Stone Lion*, 110 USPQ2d at 1163 (quoting *Gen. Mills*, 100 USPQ2d at 1600), and we agree with Opposer that the users of its software and video goods and services may include relatively unsophisticated consumers.

Applicant stated in discovery that its beer is sold for under \$12 for an individual serving, 17 TTABVUE 9 (Applicant’s Amended Response to Opposer’s Interrogatory No. 11), and the Board has previously gone so far as to “take judicial notice that beer is often relatively inexpensive [and] subject to impulse purchase.” *Bay State Brewing*, 117 USPQ2d at 1960. With respect to the goods identified in the ’654 and ’637 Applications, Applicant also stated in discovery that, “for the most part,” its non-beer merchandise is sold for under \$25, *id.*, and, as noted above, we must presume that the identified clothing and beverage ware include “all goods of the type identified, without limitation as to their nature or price,” *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*8 (TTAB 2020), including goods that are relatively inexpensive. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Id.* (quoting *Recot*, 54 USPQ2d at 1899). We find

that the fourth *DuPont* factor supports a finding of a likelihood of confusion in each opposition.

### **5. Absence of Evidence of Actual Confusion**

“The seventh and eighth *DuPont* factors consider the nature and extent of any actual confusion among consumers in light of the length of time and conditions under which there has been contemporaneous use of the parties’ subject marks.” *Brooklyn Brewery*, 2020 USPQ2d, at \*19. Both parties address these factors and conclude that they are neutral in the analysis of the likelihood of confusion in each opposition.<sup>50</sup> We agree with their conclusion.

### **6. The Variety of Goods on Which Opposer’s Mark is Used**

“The ninth *DuPont* factor takes into account the variety of goods on which a mark is or is not used.” *DeVivo*, 2020 USPQ2d 10153, at \*14. “If a party in the position of plaintiff uses its mark on a wide variety of goods, then purchasers are more likely to view a defendant’s related good under a similar mark as an extension of the plaintiff’s line.” *Id.* Opposer argues that it “uses its HUDL mark not for a single product but rather in connection with all of the company’s software, products, and services.” 30 TTABVUE 37. Applicant responds that Opposer’s “services are all narrowly related to sports video analysis.” 31 TTABVUE 45.

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<sup>50</sup> Opposer argues that these factors “are not relevant here as Applicant’s HUDL BREWING COMPANY applications were filed on an intent-to-use basis” and “Applicant has only recently begun operating its brewery and much of its planned use of the HUDL BREWING COMPANY name has not yet begun,” 30 TTABVUE 37, while Applicant expressly acknowledges that the eighth *DuPont* factor “is neutral as Applicant’s brewery has been open for less than a year.” 31 TTABVUE 45.

In *DeVivo*, the Board found that the opposer’s uses of her marks “on children’s books, T-shirts, tank tops, sweatshirts, hoodies, coffee mugs, stickers, postcards, greeting cards, tote bags and informational and educational services in the STEM fields” were “insufficient to persuade us that Opposer has used her mark on a variety of goods,” *DeVivo*, 2020 USPQ2d 10153, at \*15, rendering the ninth factor neutral. We similarly find that the factor is neutral in each opposition based on Opposer’s uses of its HUDL mark in connection with its software goods and services.

## 7. Market Interface

Opposer argues that the “tenth *DuPont* factor—the market interface between Applicant and Opposer—also favors Hudl” because “[n]ot only has Hudl not consented to Applicant’s use of the mark, it timely opposed the intent-to-use applications.” 30 TTABVUE 37. This factor is neutral in our analysis of the likelihood of confusion in each opposition because “[t]here is no evidence that there has been any interface between the parties.” *DeVivo*, 2020 USPQ2d 10153, at \*15.<sup>51</sup>

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<sup>51</sup> Under Opposer’s theory of “market interface,” the tenth *DuPont* factor would almost automatically favor the opposer because virtually every opposition is timely filed by an opposer who has “not consented to [the] [a]pplicant’s use of the mark.” 30 TTABVUE 37. That is not the sort of market interface contemplated by the tenth factor, which by its terms is directed to express or implied consents to use or registration, co-existence agreements, assignments, and laches and estoppel attributable to the owner of the prior mark. *DuPont*, 177 USPQ at 567. See *In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1162-63 (TTAB 2018) (consent agreement); *Bay State Brewing*, 117 USPQ2d at 1959 (same); *In re Ass’n of the U.S. Army*, 85 USPQ2d 1264, 1274 (TTAB 2007) (implied consent arising from communications between the parties); *In re Opus One Inc.*, 60 USPQ2d 1812, 1818-19 (TTAB 2001) (past business dealings between applicant and owner of the cited registration).

## 8. Applicant's Right to Exclude Others

Opposer argues that “given that the applications are based on intent-to-use and not on some prior use of the HUDL BREWING COMPANY mark, Applicant has no right to exclude others from [sic] the use of the mark” under the eleventh *DuPont* factor. 30 TTABVUE 37. “In the few precedential Board cases discussing the eleventh *DuPont* factor, (the extent to which applicant has the right to exclude others from use of its mark on its goods), applicants have failed to show sufficient use of their marks to establish a right to exclude others from use of their marks on their goods.” *DeVivo*, 2020 USPQ2d 10153, at \*15. Opposer’s mere notation that the applications are based on Applicant’s intention to use its marks is insufficient to show that Applicant has no rights. As an intent-to-use filer, Applicant was under no obligation to commence use of its mark. The record shows, in any event, that Applicant has begun use of its mark, but “Opposer has not provided any significant information about the advertising and sales” of Applicant’s goods. *Id.* This factor is neutral in our analysis of the likelihood of confusion in each opposition. *Id.*

## 9. Extent of Potential Confusion

The twelfth *DuPont* factor considers the “extent of potential confusion, i.e., whether *de minimis* or substantial.” *DuPont*, 177 USPQ at 567.<sup>52</sup> Opposer argues that the extent of potential confusion is substantial because its goods and services are used by many millions of people in the United States and “the consumer bases and channels of trade for beer and sports are highly related.” 30 TTABVUE 38. In our

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<sup>52</sup> Opposer incorrectly identifies this factor as “the final *DuPont* factor.” 30 TTABVUE 38.

discussion above of the relatedness of Opposer's goods and services to beer, we rejected the second premise of Opposer's argument, and we find that this factor is neutral in our analysis of the likelihood of confusion in each opposition.

#### **10. Balancing the *DuPont* Factors**

The first, fourth, and fifth *DuPont* factors support a finding of a likelihood of confusion, while the second and third *DuPont* factors support a contrary finding, and the other factors are neutral. Although the marks are similar, Opposer's HUDL mark is quite strong in the high school sub-market for the goods and services for which it is registered, and Applicant's goods may be subject to impulse purchase by some consumers, we give greater weight in our analysis to the stark dissimilarity of the goods and services identified in Opposer's registration and the goods identified in Applicant's applications, and the lack of any evidence that the respective goods and services are sold in overlapping channels of trade to overlapping consumers. We conclude that the goods and services are simply too far afield for confusion to be likely. We find that Opposer did not show, by a preponderance of the evidence, that Applicant's use of the mark HUDL BREWING COMPANY for the goods identified in its three applications is likely to cause consumers of those goods to believe mistakenly that they originate with, or are authorized or sponsored by, the owner of the registered HUDL mark.

**Decision:** Because Opposer failed to prove either its likelihood of confusion claim or its likelihood of dilution claim, Opposition Nos. 91247770, 91248342, and 91248316 are dismissed.